MISSISSIPPI LAW JOURNAL

SPECIAL ISSUE

WATERGATE, IMPEACHMENT, AND THE CONSTITUTION

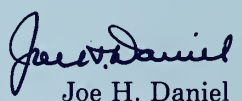
Philip B. Kurland

THE MEMORIAL LECTURE SERIES—1974

MISSISSIPPI STATE BAR

The Mississippi State Bar is grateful to the law firm of Butler, Snow, O'Mara, Stevens and Cannada for its grant to the University Law School, which has made possible an annual lecture series at the University. The first such lectures were delivered by Professor Philip B. Kurland, distinguished constitutional lawyer, at the Law School on March 27, 28 and 29, and are presented in this special issue.

The Bar also commends Mississippi Valley Title Insurance Company for its generous contribution which has made possible this special issue of the Mississippi Law Journal as a public service to the lawyers of Mississippi, so that they may be better informed on this important and timely subject.



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THE UNIVERSITY OF MISSISSIPPI SCHOOL OF LAW MEMORIAL LECTURES

The University of Mississippi School of Law Memorial Lectures was established in 1973 by a Jackson law firm to honor its founding partners. As specified in the granting document, the purpose of the Lectures is to "provide substantial educational enrichment opportunities for the students and faculty of the Law School, and such members of the bench, bar and academic community as may appropriately be included."

The theme for the Lectures is "The Role of the Law in the Remainder of the Twentieth Century." Each lecturer will develop his presentation in accordance with this general theme and will project the impact of his subject matter area during the next quarter century.

The Lectures, to be presented each spring at the Law School, will subsequently be published as a special issue of the *Mississippi Law Journal.* They will thus be made available to every Mississippi practitioner and to academic law libraries throughout the country.

As the initial lecturer, we were honored to have Philip B. Kurland, William R. Kenan, Jr. Professor at the University of Chicago and Professor of Law at the University of Chicago School of Law. When Phil Kurland was appointed Chief Consultant to the United States Senate Subcommittee on Separation of Powers in 1967, Senator Sam Ervin, chairman of the Subcommittee, said:

> Professor Kurland is one of the greatest authorities on the United States Constitution that America has ever known. He is not only a scholar in the traditional sense of knowing court decisions and their trends, he is also a brilliant legal technician, an eloquent writer, and one of those rare men who know the language, the intent, and the history of the Constitution . . . .

Philip Kurland is indeed an impressive constitutional scholar—for confirmation, one need only note his prodigious output in this field. Since 1960, he has edited the Supreme Court Review and his published books include *Jurisdiction of the Supreme Court of the United States* (1951), *Religion and the Law* (1962), *The Great Charter* (1965, 1966), *The Supreme Court and the Constitution* (1965), *Felix Frankfurter on the Supreme Court* (1970), *Politics, the Constitution, and the Warren Court* (1970), and *Mr. Justice Frankfurter and the Constitution* (1971).

Professor Kurland currently is writing a biography on former Supreme Court Justice Robert H. Jackson. He has held many lectureships, including the Thomas Cooley Lectureship at the University of Michigan in 1969, and the Oliver Wendell Holmes Devise Lectureship in 1972. His articles in law reviews and other journals number in excess of 100. He has also twice been a Guggenheim Fellow.

Born in New York City on October 22, 1921, Philip Kurland received his A.B. degree with honors from the University of Pennsylvania and his LL.B. degree with honors from the Harvard Law School where he was president of the *Harvard Law Review*.

He clerked for Judge Jerome N. Frank of the United States Court of Appeals for the Second Circuit and for Associate Justice Felix Frankfurter of the United States Supreme Court. He then served as an attorney in the United States Department of Justice and, for a period of three years, was in private law practice with the New York law firm of Kurland and Wolfson.

His first venture into law teaching was as a visiting professor at Indiana University in 1950. He then taught at the Northwestern University School of Law and, in 1953, was appointed to the faculty of the University of Chicago Law School.

Philip Kurland's career has been consistently marked by a quality of brilliance which will enshrine him as one of the truly great constitutional law scholars of our time. We are honored to have so distinguished a person to initiate the Memorial Lectures.

Dean Parham H. Williams, Jr.
University of Mississippi School of Law

WATERGATE, IMPEACHMENT, AND THE CONSTITUTION*

I have little confidence in my own infallibility, and as little in the infallibility of others.

Sir Robert Peel

I. Introduction

Scandals in the United States, and not least political scandals, have usually been short-term affairs. In most such instances, the press publishes the charges of wrongdoing with its accustomed fervent, often noisome, self-righteousness. Usually, the accused is quickly condemned by the public, often removed from office and soon forgotten, as with Sherman Adams, or Abe Fortas, or Spiro Agnew, or left to the long-drawn processes of the criminal law, as with Bobby Baker or Otto Kerner. In the latter event, the press coverage is ordinarily intense and titillating during the period of the trial, but the case is soon beyond the interest of the American public. Seldom do the hot political cases involve more than the pecadilloes of a single, temporarily high-placed official; seldom do the cases present basic problems of a constitutional nature.

The Watergate affair is different. It is different because the immediate criminal acts are but symptoms of a deeper and more fundamental ailment. It is different because it is not concerned with underlings, but with personages who have held the governance of the nation in their soiled hands. It is different because the essence of the wrongdoing is not to be found in the greed for money. It is different because it raises important constitutional questions, not least of which is, as President Nixon constantly reminds us, the question of the proper scope of the presidency itself in our constitutional democracy. Not the XYZ affair, not the corruption of the Grant administration, not the Teapot Dome scandal, not all of them together cut so deep a wound in the American body politic.

The only analogue that comes to my mind does not derive from American history at all. It is, rather, the Dreyfus affair that shook the French Republic at the turn of the century and consumed a decade in its unfolding and its cure.[1] One is also reminded by the facts of Water-

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[1]*See* D. Lewis, Prisoners of Honor: The Dreyfus Affair (1973).

gate of Emile Zola's speech in his own defense at his trial for defamation:

> Do you not understand now that what the nation is dying of is the obscurity in which there is an obstinate determination to leave it? The blunders of those in authority are being heaped upon those of others; one lie necessitates another, so that the mass is becoming formidable. A blunder was committed, and then to hide it a fresh crime against good sense and equity has had daily to be committed!
>
> The responsibility lies with the power which, to cover the guilty, and in furtherance of political interests, has denied everything, hoping to be strong enough to prevent the truth from being shed. It has maneuvered in behalf of darkness, and it alone is responsible for the present distraction of conscience. . . . A nation cannot be thus upset without imperiling its moral existence. This is an exceptionally serious hour.[2]

And it was William James who wrote, at the time of the Dreyfus case:

> Talk of corruption! We don't know what the word corruption means at home, with our improvised and shifting agencies of crude pecuniary bribery, compared with the solidly entrenched and permanently organized corruptive genuises of monarchy, nobility, church, Army, that penetrate the very bosom of the higher kind as well as the lower kind of people in all European states . . . and sophisticate their motives away from the impulse to straightforward handling of any simple case.[3]

We now know the kind of corruption of which James then wrote. Certainly, as the Agnew case revealed, "crude pecuniary bribery" is still with us. But we have achieved the sophistication of European depravity. Niccolo Machiavelli advised his prince: "If the chief party, whether it be the people, or the army, or the nobility, which you think most useful and of most consequence to you for the conservation of your dignity, be corrupt, you must follow their humor and indulge them, and in that case honesty and virtue are pernicious."[4] And the events of Watergate suggest that, for the highest officials of our realm, "honesty and virtue are pernicious."

Even so, the immediate events of Watergate are not so threatening to our democracy as the more fundamental ailment of which Watergate is only a symptom. In his recent tour-de-force, in some ways an *apologia*

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[2]Proces Zola dêtroute Le Coeur d'Assises dè la Seine et le Coeur de Cassation (7 Fevrier-23 Fevrier, 31 Mars-Avril 1898) (21 February).

[3]N. HALASZ, CAPTAIN DREYFUS: THE STORY OF A MASS HYSTERIA 233 (1955).

[4]N. MACHIAVELLI, DE PRINEIBATIBU ch. xix (1513).

pro sua vita, Arthur Schlesinger noted the terminal illness that threatens us:

> For Watergate was a symptom, not a cause. Nixon's supporters complained that his critics were blowing up a petty incident out of all proportion to its importance. No doubt a burglary at Democratic headquarters was trivial next to a mission to Peking. But Watergate's importance was not simply in itself. Its importance was in the way it brought to the surface, symbolized and made politically accessible the great question posed by the Nixon administration in every sector—the question of presidential power. The unwarranted and unprecedented expansion of presidential power, because it ran through the whole Nixon system, was bound, if repressed at one point, to break out at another. This, not Watergate, was the central issue.[5]

Clearly, Schlesinger was correct in his analysis. But, possibly because he was an agent of earlier administrations, he did not see that the disease was contracted before Nixon came to power. The power of arrogance, the cancer that could kill our republic, was fully impregnated by the Kennedy administration, grew under the Johnson administration, and only achieved its culmination under Nixon.

Tom Wicker, of the New York Times—certainly no ally of the Nixon administration—could see more clearly what Schlesinger failed to perceive. Anticipating the title of Schlesinger's book, *The Imperial Presidency,* Wicker wrote in one of his columns:

> . . . it was "strong" Democratic Presidents who did the most to expand the Presidency to its present imperial status. . . . [T]he doctrine of implied powers . . . is primarily the product of liberal Democratic thought and policy and ultimately was bound to lead to abuse.
>
> This is not a justification for Watergate or any other excessive use of state power, it ought to be a warning, however, that liberal Democrats will not automatically end the threat to liberty inherent in the imperial Presidency merely by coming back to power in 1976.[6]

I shall return at the end of my remarks to this most fundamental constitutional problem. Here, however, I should like to examine one of the other, subordinate constitutional issues spewed up by the Watergate affair: the issue of impeachment.

No one should undertake constitutional exegesis without acknowledging the first principle of construction as announced by Marshall in his greatest opinion.[7] It was in *McCulloch v. Maryland*[8] that he admon-

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[5]A. Schlesinger, The Imperial Presidency 275 (1973).

[6]New York Times, Oct. 2, 1973, at 43, col. 1.

[7]*See* Felix Frankfurter on the Supreme Court 535 (P. Kurland ed. 1970).

[8]17 U.S. (4 Wheat.) 316, 407 (1819).

ished: "[W]e must never forget that it is *a constitution* we are expounding." As Felix Frankfurter has pointed out: "The Constitution is, of course, a legal document, but a legal document of a fundamentally different order from an insurance policy or a lease of timberland."[9] And his meaning, as Marshall's, is enlightened by reference to Mr. Justice Holmes's statement of the nature of constitutional languages:

> [T]he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.[10]

And to none of the Constitution's provisions is such an approach more necessary than to those concerned with impeachment. All the more because we have no guidance from judicial opinions. There have been no Supreme Court decisions to tell us what article II, section 4 of the Constitution means. We can rely only on the words of the Constitution, their purpose and function, and their history, both before and after their inclusion in the basic document.

We are somewhat handicapped in our search for meaning in article II, section 4, not only because our judicial masters have not told us what to think, but because most of the available authoritative opinion derives from those speaking as partisans. We should welcome the views of a Benjamin Curtis and of a Luther Martin. But Curtis spoke as counsel for Andrew Johnson in his impeachment trial, and Martin was the principal lawyer for Supreme Court Justice Samuel Chase when he was brought to the bar of the Senate.[11] And, if the views of our predecessors are tainted by bias, it must be conceded that contemporary writers on the subject suffer the same lack of detachment. They are prisoners of their cause, as we may all be in the immediate context of the Watergate aftermath. What we need is the kind of wisdom that Learned Hand once ascribed to Mr. Justice Cardozo, when he wrote:

> [T]he wise man is the detached man. . . . By that I mean more than detached from his grosser interests—his advancement and his gain. Many of us can be that . . . . I am thinking of something far more subtly interfused. Our convictions, our outlook, the whole make-up of our thinking, which we cannot help bringing to the decision of every question, is the creature of our past; and into our past have been woven all sorts of frustrated ambitions with their envies, and hopes of prefer-

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[9]FELIX FRANKFURTER, *supra* note 7, at 389.

[10]Gompers v. United States, 233 U.S. 604, 610 (1914).

[11]*See, e.g.*, P. CLARKSON & R. JETT, LUTHER MARTIN OF MARYLAND 206-28 (1970); 2 B. CURTIS, THE LIFE AND WRITINGS OF B. R. CURTIS 343-422 (1879).

> ment with their corruptions, which long since forgotten, still determine our conclusions. A wise man is one exempt from the handicap of such a past; . . . he can weigh the conflicting factors of his problem without always finding himself in one scale or the other.[12]

II. "High Crimes and Misdemeanors"

The Constitution, in article II, section 4, provides: "The President, Vice President and all civil Officers of the United States shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." The essential question, what is the meaning of the phrase "other high Crimes and Misdemeanors," has been the center of controversy in almost every impeachment trial that has ever been brought before the Senate.

Essentially, the contesting parties today speak exactly the same language as did the partisans from the beginning of our history. Thus, Dumas Malone, in his brilliant biography of Thomas Jefferson, put the problem for the impeachment trial of Mr. Justice Samuel Chase of the United States Supreme Court in these words:

> The crucial question throughout these, and the question of most enduring interest, was that of the nature and limitation of impeachment within the constitutional framework. Opinions ranged from the one most strikingly voiced by Senator Giles at the outset, that impeachment was a mere political inquest into which the question of criminality did not enter, to the Federalist contention that no offense was impeachable if not indictable.[13]

Malone thus recognized that these were the extremes in positions, not necessarily the only alternative constructions between which choice must be made. It might well be, as the most recent eminent authority on the subject has told us it is,[14] that neither indictable offense nor mere political whim is the guiding standard.

A. Textual Construction

Essentially, the argument that an impeachable offense be defined in terms of indictable crime rests on the fact that the words used in the Constitution are "other high Crimes or Misdemeanors;" in other words, "a crime is a crime is a crime." That the phrase was concerned with the same kinds of offenses against the law as constitute crimes for other purposes is, indeed, supported by some other phraseology of the Constitution. Thus, article III, section 2 provides: "The trial of all Crimes,

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[12]L. Hand, The Spirit of Liberty 132 (2d ed. 1953).

[13]D. Malone, Jefferson The President: First Term, 1801-05, 478 (1970).

[14]R. Berger, Impeachment: The Constitutional Problems (1973).

except of Impeachment, shall be by Jury." Certainly this suggests a belief that trial of impeachment is like "the trial of all [other] crimes" and would require a jury like other criminal cases were it not thus specifically exempted from the general category within which it naturally fell. The same conclusion may be drawn from the language in article II, section 2, which grants the pardoning power to the President in these words: He "shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment," thus suggesting that impeachment is simply another "offense against the United States." And, in two places, article I, section 3, refers to affirmative Senate action in impeachment cases as "convictions." Article I, section 3, paragraph 6 reads:

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

The seventh paragraph of the same article reads:

> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Obviously the last is Janus-faced on the question whether impeachment lies only for a indictable offense. While it speaks of convictions, at the same time it rejects the sanctions primarily available for criminal convictions: fine, physical punishment, or imprisonment. Moreover, it prevents a judgment of conviction on impeachment from having the effect otherwise applicable to judgments of conviction or acquittal that would bar further criminal trial for the same acts as ground the impeachment charges.

On the other hand, different provisions of the Constitution dealing with crimes plainly do not include impeachments within their ken. These, in turn, would suggest that article II, section 4 was not concerned with ordinary crimes. Thus, amendments V and VI, promulgated in 1791, have not been deemed to modify the procedure provided for impeachment proceedings although article V requires a presentment or indictment in every case of "capital, or otherwise infamous crime," and exception was specifically made for military proceedings. Nor has the ban on double jeopardy in the fifth amendment been thought to amend the provision in article I that would allow prosecution after conviction on impeachment. Again, the sixth amendment requires jury trial "in all

criminal prosecutions" but is not believed to be applicable to impeachment proceedings, although here, unlike the language of article III, there is no specific exemption for cases of impeachment.

Were we confined to construing the words of article II, section 4 through late 20th century dictionary definitions, we could conclude that, although there is some ambiguity in the Constitutional language, a case might be made for the proposition that an impeachment must rest on charges that would sustain an indictment under the Criminal Code of the United States. But we ought not give even a statute such a narrow reading, no less the Constitution. As Mr. Justice Frankfurter was wont to remind us: "The Constitution, we cannot recall too often, is an organism, not merely a literary composition."[15] And so, we must look not merely to the words of the document, but to what those words meant to those who wrote them, to the function that they were intended to serve, to the history of their use before, during, and after their composition.

B. English Precedents

Impeachment was not a concept created by the Founding Fathers. Like so many of the principles of our Constitution, impeachment was inherited both from the English Constitution and from those of the States whose independence from Great Britain in 1776 resulted in a confederation of sovereign nations that became a Union only some 13 years later. The authors of our basic document were kept peculiarly informed of the notion of impeachment by reason of the fact that the gestation of our Constitution occurred while the impeachment of Warren Hastings was proceeding at Westminster.[16] Edmund Burke, the champion of the American cause in Parliament was, at the same time, the chief mover for Hastings's impeachment. He thought impeachment was the "great guardian of the purity of the Constitution."[17] And it was in this cause that Richard Sheridan delivered "the most famous of parliamentary speeches."[18] Even in the absence of television and radio, these men made news in the soon-to-be United States.

For the English, however, impeachment was a double-edged sword. It was used not only to sever a man from his office, but also his head from his body. This does not mean that removal and punishment were always the joint objective of English impeachments. There were instances, such as the case with Warren Hastings, where the official charged

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[15]Burstyn v. Wilson, 343 U.S. 495, 518 (1952).

[16]*See* K. FEILING, WARREN HASTINGS 343-71 (1954).

[17]E. BURKE, THE WORKS OF EDMUND BURKE 397 (1839), *quoted in* R. BERGER, *supra* note 14, at 299 n.3.

[18]K. Feiling, *supra* note 16, at 346. *See also* L. GIBBS, SHERIDAN 128-43 (1948).

was no longer an official by the time he was charged and all that was involved was proof of guilt of a crime warranting sanctions other than removal by the House of Lords. (It is to be noted that trial in the House of Lords was appropriate for most, if not all, of those subjected to impeachment processes, because it was there and only there that they would be tried for their crimes. It is, therefore, not surprising that there was much controversy over the question whether a commoner was subject to impeachment. This question, of course, underlines the notion that impeachment in England was a trial for a crime.)

One thing that the writers of the American Constitution made clear, however, was that no matter how much they were following the footsteps of their English predecessors, the impeachment process was not to be the alternative to, or a substitute for, criminal proceedings. They did this both by restricting the sanctions that might be applied to removal from office and disqualification from further office and also by providing that conviction on impeachment did not preclude further ordinary criminal proceedings.

This basic difference between the American and the English processes requires that the English precedents be scrutinized with a wary eye. For in many ways the English procedures are truly criminal in ways that the American procedures clearly are not. This difference does not mean, as Irving Brant would have it mean, that the American impeachments are to be more closely analogized to the criminal law. I should draw exactly the opposite conclusion, and I do not find Mr. Brant's book persuasive in its appeal that impeachment can rest only on a violation of the criminal code.[19] (The book, incidentally, like much of the writing on the subject is a bit of special pleading. It is essentially a response to Gerald Ford's claim in the Douglas impeachment proceedings that the House and Senate are free to impeach and convict for any behavior they deem inappropriate.) Even so, it is clear that, however criminal in their nature, under the English precedents impeachment did not necessarily rest on charges of indictable offenses.

This is made evident by examples from some of the most famous of English impeachment proceedings. Thus, in 1386, the Earl of Suffolk was impeached for, among other things, the breach of a promise to the Parliament "to ransom the town of Ghent."[20] In 1640, the Earl of Strafford was charged with endeavoring "to introduce an Arbitrary and Tyrannical Government against Law."[21] Henry Yelverton, the King's At-

[19]*See* I. BRANT, IMPEACHMENT: TRIALS AND ERRORS (1972).

[20]G. ADAMS & H. STEVENS, SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY 148-50 (1918).

[21]Rushworth, *The Tryal of Thomas Earl of Strafford*, in 8 HISTORICAL COLLECTIONS 8 (1686).

torney General, was impeached in 1621 for failing to prosecute suits that he had commenced and for exercising authority before it was legally given to him.[22] The Earl of Oxford was impeached in 1701 on the ground that he had "violated his duty and trust" in taking advantage for his own benefit of the power of a Privy Councilor to influence the King and for granting a naval commission to the infamous Captain Kidd,[23] a pirate, not a "plumber."

This point was ably made and proved by Professor Berger, who summed it up this way:

> The foregoing examples by no means exhaust the list which could be adduced to illustrate that English impeachments did proceed for misconduct that was not "criminal" in the sense of the general criminal law.
>
> These charges fulfill an even more important purpose—they serve, broadly speaking, to delineate the outlines of "high crimes and misdemeanors." For they are reducible to intelligible categories: misapplication of funds (Earl of Suffolk, Seymour), abuse of official power (Duke of Suffolk, Buckingham, Berkely, Yelverton, Mordaunt, Scroggs), neglect of duty (Buckingham, Pett), encroachment on or contempts of Parliament's prerogatives (Gurney, North, the Ship-Money Tax opinions.) Then there are a group of charges which can be gathered under the rubric "corruption" . . . .[24]

The problem is obviously complicated by the fact that while the word "crimes" obviously was used to include "high crimes and misdemeanors," high crimes and misdemeanors were a separate and specially included category of misbehavior, describing only political wrongs to be dealt with by political trials for impeachment, attainder, and treason. Thus, Blackstone could and did say that "an impeachment before the lords by the commons of Great Britain, in parliament, is a prosecution of the already known and established law . . . ."[25] But this did not mean violation of statutory laws but the established common law of "high misdemeanors" which he defined as "*the mal-administration* of such high officers, as are in public trust and employment."[26]

F.W. Maitland appeared to go further and lend support to Gerald Ford. His understanding appears to have been that the High Court of Parliament could, indeed, define the crime, much as did the courts of common law, in the very course of exercising its judgment; *pro re nata*

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[22] 2 T. Howell, State Trials 1135-37 (1809).

[23] A. Simpson, A Treatise on Federal Impeachments 144 (1916).

[24] R. Berger, *supra* note 14, at 69-70.

[25] 4 W. Blackstone, Commentaries *256.

[26] *Id.* at *121 (emphasis added).

was the phrase used and rejected by Blackstone.[27] In the course of applauding the disappearance of impeachment as a criminal process in England, Maitland wrote:

> It seems highly improbable that recourse will again be had to this ancient weapon unless we have a time of revolution before us. If a statesman has really committed a crime then he can be tried like any other criminal: if he has been guilty of some misdoing that is not a crime, it seems far better that it should go unpunished than that new law should be invented for the occasion, and that by a tribunal of politicians and partizans; for such misdoings disgrace and loss of office are now-a-days sufficient punishments.[28]

So far as American impeachment is concerned, of course, "disgrace and loss of office" are the only sanctions that could ever result from impeachment. So, according to either the Blackstonian concept, that high crimes and misdemeanors consist of "maladministration of such high officers as are in public trust and employment," or the Maitland belief that the crime may be newly defined by Parliament each time, there would be no need to resort to the criminal code to determine which conduct properly grounds a charge for impeachment.

It was not until 1875 that Mr. Justice Swayne reminded us: "The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by consideration of right, justice, and the public good."[29] Nevertheless, this notion seemed to underlie the English concept that impeachments require not merely distaste for the officer or his policies, but a violation of the fiduciary duties that are implicit in public office. And this, too, clearly comes through the comparatively sparse legislative history of the development of the impeachment clause in the 1787 Convention.

C. The Constitutional Convention of 1787

All of the major constitutional plans brought to the 1787 Convention provided for removal of the executive, however much they differed on the composition of the executive. The Patterson or New Jersey Plan, called for removal of the executive by Congress "on application by a majority of the Executives of the several States."[30] The Virginia Plan called for removal on conviction after impeachment by the House for

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[27] *Id.* at *256.

[28] F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 477 (H. Fisher ed. 1961).

[29] Trist v. Child, 88 U.S. (21 Wall.) 441, 450 (1875).

[30] 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 1787, 244 (1937) [hereinafter cited as FARRAND].

malpractice or neglect of duty and trial by the judiciary.[31] The Hamilton Plan called for removal of "all officers of the United States" on "impeachment for mal—and corrupt conduct; and upon conviction to be removed from office, & disqualified from holding any place of trust or profit—all impeachments to be tried by a Court to consist of the Chief Judge of the Superior Court of Law of each State, provided such Judge shall hold his place during good behavior, and have a permanent salary."[32]

It is not insignificant that the concern of the Convention from the beginning and throughout was centered on a means for removal from office and not on punishment for misbehavior.

On June 2, 1787, it was moved that the executive "be removable on impeachment and conviction of mal practice or neglect of duty."[33] The motion passed.[34] It had followed a motion by Dickenson that the executive be removable by request of a majority of the state legislatures. This was rejected by a vote of all states except Delaware.[35]

Madison and Wilson opposed such power in state legislatures on the grounds that:

> it would leave an equality of agency in the small with the great States; that it would enable a minority of the people to prevent ye removal of an officer who had rendered himself justly criminal in the eyes of a majority; that it would open a door for intrigues agst. him in States where his administration tho' just might be unpopular, and might tempt him to pay court to particular States whose leading partizans [*sic*] he might fear, or wish to engage as his partizens. They both thought it bad policy [to introduce such a mixture] of the State authorities, when their agency could be otherwise supplied.[36]

The last reference was evidently a response to the suggestion of the New Jersey Plan that removal be accomplished not by the State legislatures but by the State executives.

Madison apparently had made it clear, in opposing the Dickenson proposal, that "it was far from being his wish that every executive Officer should remain in Office, without being amenable to some Body for his conduct."[37]

The Journal for June 13, as well as Madison's notes, show that the executive was "to be removable on impeachment and conviction of mal

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[31] 2 *id.* at 134.
[32] 1 *id.* at 292-93.
[33] *Id.* at 78.
[34] *Id.* at 79.
[35] *Id.* at 87.
[36] *Id.* at 86.
[37] *Id.* at 92.

practice or neglect of duty."[38] On July 20, according to these same sources, the Convention voted to retain this provision by a vote of eight States to two.[39] It was at this time that the major recorded debate on the subject took place.

Richardson Davie "considered [impeachment] as an essential security for the good behaviour of the Executive."[40] James Wilson agreed.[41] Governeur Morris at first was opposed to impeachment.[42] But he later felt "corruption & some few other offences to be such as ought to be impeachable; but thought the cases ought to be enumerated & defined."[43] And, finally, he announced that he had been convinced by the debates "of the necessity of impeachments, if the Executive was to continue for any time in office."[44] Nevertheless, he thought that the Convention "should take care to provide some mode that will not make him dependent on the Legislature."[45]

George Mason of Virginia asserted: "No point is of more importance than that the right of impeachment should be continued. [Note that he was talking of continuing, not creating the 'right' of impeachment.] Shall any man be above Justice? Above all shall that man be above it, who can commit the most extensive injustice?"[46]

At this point, Franklin showed himself to be uncharacteristically shortsighted. He argued for the necessity of impeachment processes in order to prevent removal by assassination. [47] Assassination has remained a prime method of ending presidential terms. Impeachment has never been successfully used to this end.

It was here that Madison once again showed himself as the primary statesman of the Convention, although one is compelled to rely on his own notes as proof thereof:

> Mr. [Madison]—thought it indispensable that some provision should be made for defending the Community agst the incapacity, negligence or perfidy of the chief Magistrate. The limitation of the period of his service, was not a sufficient security. He might lose his capacity after his appointment. He might pervert his administration into a scheme of peculation or oppression. He might betray his trust to foreign powers. The case of the Executive Magistracy was very distin-

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[38] *Id.* at 230, 236.
[39] 2 *id.* at 61.
[40] *Id.* at 64.
[41] *Id.*
[42] *Id.*
[43] *Id.* at 65.
[44] *Id.* at 68.
[45] *Id.* at 69.
[46] *Id.* at 65.
[47] *Id.*

guishable, from that of the Legislative or of any other public body, holding offices of limited duration. It could not be presumed that all or even a majority of the members of an Assembly would either lose their capacity for discharging, or be bribed to betray, their trust. Besides the restraints of their personal integrity & honor, the difficulty of acting in concert for purposes of corruption was a security to the public. And if one or a few members only should be seduced, the soundness of the remaining members, would maintain the integrity and fidelity of the body. In the case of the Executive Magistracy which was to be administered by a single man, the loss of capacity or corruption was more within the compass of probable events, and either of them might be fatal to the Republic.[48]

Pinckney refused to see the need for impeachment, and he particularly disliked the notion that the Executive would be responsible to the legislature.[49] Like Rufus King,[50] he thought that this would be a fundamental breach in the concept of separation of powers. King asserted that the President "ought not to be impeachable unless he hold his office during good behavior, a tenure which would be most agreeable to him; provided an independent and effectual forum could be devised; But under no circumstances ought he to be impeachable by the Legislature. This would be destructive of his independence and of the principles of the Constitution. He relied on the vigor of the Executive as a great security for public liberties."[51] In this last regard he seems to have been no more prescient than was Dr. Franklin.

Elbridge Gerry "urged the necessity of impeachments. A good magistrate will not fear them. A bad one ought to be kept in fear of them. He hoped the maxim would never be adopted here that the chief Magistrate could do [no] wrong."[52]

Edmond Randolph also urged provision for impeachment:

The propriety of impeachments was a favorite principle with him; Guilt wherever found ought to be punished. The Executive will have great opportunities of abusing his power; particularly in time of war when the military force, and in some respects the public money will be in his hands. Should no regular punishment be provided, it will be irregularly inflicted by tumults & insurrections. He is aware of the necessity of proceeding with a cautious hand, and of excluding as much as possible the influence of the Legislature from the business. He suggested for consideration an idea which had fallen (from Col. Hamilton) of com-

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[48] 2 *id.* at 65-66.
[49] *Id.* at 66.
[50] *Id.* at 66-67.
[51] *Id.* at 67.
[52] *Id.* at 66.

> posing a forum out of the Judges belonging to the States: and even of requiring some preliminary inquest whether just grounds of impeachment existed.[53]

It was after this debate that the provision remained unchanged, with eight States voting in favor of the impeachment provision and only Massachusetts and South Carolina for its rejection. The provision for impeachment for "mal-practice or neglect of duty" was once again approved on July 26.[54] The Journal for August 20th, however, shows that the reference to the Committee of Five provided: "Each of the Officers abovementioned shall be liable to impeachment and removal for neglect of duty, malversation, or corruption."[55] And the Journal showed that the September 4 draft provided for impeachment but only for "treason or bribery."[56] On September 8, the Journal reveals that, by a vote of seven to four, the words "or other high crimes and misdemeanors against the State" were added.[57] An attempt to remove the Senate as the tribunal for judgment failed.[58]

Madison's notes for that day show how the adoption of the provision for impeachment for "other High Crimes and Misdemeanors" came about. Mason objected to impeachment being limited to cases of treason and bribery:

> Why is the provision restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offences. Hastings is not guilty of Treason. Attempts to subvert the Constitution may not be Treason as above defined—As bills of attainder which have saved the British Constitution are forbidden, it is the more necessary to extend: the power of impeachments. He movd. to add after "bribery" "or maladministration."[59]

Madison objected that the term "maladministration" was "[s]o vague" as to be "equivalent to a tenure during pleasure of the Senate."[60] He should have known better, since "maladministration" was the term used in the Virginia constitution among others. He did mean to make clear that the Constitution was not authorizing the removal of the executive at the will of Congress. Then Morris suggested that the shortness of the 4-year term would take care of worries about "maladminis-

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[53] *Id.* at 67.
[54] *Id.* at 116.
[55] *Id.* at 337.
[56] *Id.* at 495.
[57] *Id.* at 545.
[58] *Id.*
[59] *Id.* at 550.
[60] *Id.*

tration." Thereupon, Mason withdrew the word "maladministration" and substituted "other high crimes & misdemeanors."[61]

Thus, the impeachment clause came for ratification by the States in the words that we now know it.

One might deduce from the convention history that the words "high Crimes and Misdemeanors" were known to carry the connotation of the English precedents. The evidence clearly reflects, however, that the concern was over abuse of official authority as the basis for the action of removal rather than concern with personal misbehavior of any man who happened to be in office. Madison's remark about the possible abuse of the word "maladministration" was apparently accepted, although several state constitutions had used that word as the basis for impeachment without intending that the chief executive would be subject to removal at the will of the legislature. At the same time, he seemed to think that the word misdemeanor (which he separated from the phrase which had a provenance that gave it meaning different from other misdemeanors) gave too great license to the legislature to call anything a misdemeanor on which impeachment could rest.

The purpose of the provision is clear. It is not punishment of an individual for criminal activity, but removal from office for abuse of authority. There is no suggestion that removal must be based on what would be a criminal act if committed by someone other than the occupant of a government office. The antecedent history of the phrase "high Crimes and Misdemeanors" would seem to define the narrowest limitations; the Convention debates afford only the argument that the discretion of the legislature on impeachment is even broader than that historical meaning, certainly not that it was narrowed to indictable offenses. Those present could hardly have understood Colonel Mason, in the context in which the amendment was offered and received, to be adding petty larceny or criminal conversation and similar misdeeds to the catalogue of those offenses calling for removal from office.

D. Ratifying Conventions

If the actions of the delegates at the 1787 Convention are the best evidence of the meaning of the words of the basic document and of their purpose and function, close behind are the presentations made to the people of the States when they were called upon to bring the Constitution and the nation to life by ratification of the product of Philadelphia. The supporters of the Constitution worked the length and breadth of the Confederation explaining the document and exhorting the people to support it. They made representations on the basis of which support was

[61] *Id.*

granted or denied.

Certainly the most famous and perhaps the most authoritative of these efforts was undertaken in a series of newspaper reports by the team of Alexander Hamilton, James Madison, and John Jay which were subsequently gathered under the title *The Federalist Papers*. Although they were directed to residents of New York, in what would today be called a "crucial" election, the documents have proved even more important as a guide to construction since the Constitution was adopted. As Chief Justice Marshall noted in *Cohens* v. *Virginia*,[62] "Its intrinsic merit entitles it to this high rank [as an expositor of the meaning of the Constitution]; and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed."

It fell to Hamilton to explicate the Constitution's impeachment provisions in *The Federalist* Nos. 65 and 66. The allocation of authority to the two branches of the national legislature, like so many of the Constitution's provisions, derived from uncommon reason and common experience:

> A well-constituted court for the trial of impeachments is an object not more to be desired than difficult to be obtained in a government wholly elective. The subjects of its jurisdiction are those offences which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself. . . .
>
> What, it may be asked, is the true spirit of the institution itself? Is it not designed as a method of NATIONAL INQUEST into the conduct of public men? If this be the design of it, who can so properly be the inquisitors for the nation as the representatives of the nation themselves? It is not disputed that the power of originating the inquiry, or, in other words, of preferring the impeachment, ought to be lodged in the hands of one branch of the legislative body. Will not the reasons which indicate the propriety of this arrangement strongly plead for an admission of the other branch of that body to share of the inquiry? The model from which the idea of this inquisition has been borrowed pointed out that course to the convention. In Great Britain it is the province of the House of Commons to prefer the impeachment, and of the House of Lords to decide upon it. Several of the State constitutions have followed the example. As well the latter as the former seem to have regarded the practice of impeachments as a bridle in the hands of the legislative body upon the executive servants of the government. Is not this the true light in which it ought to be regarded?[63]

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[62] 19 U.S. (6 Wheat.) 264, 417 (1821).

[63] THE FEDERALIST No. 65, at 396 (Mentor ed. 1961) (A. Hamilton).

In setting out the reasons why the trial was not assigned to the Supreme Court, Hamilton noted the less than rigidly confined nature of the proceedings, which, he said,

> can never be tied down by such strict rules, either in the delineation of the offence by the prosecutors or in the construction of it by the judges, as in common cases serve to limit the discretion of courts in favor of personal security. . . . The awful discretion which a court of impeachments must necessarily have to doom to honor or to infamy the most confidential and the most distinguished characters of the community forbids the commitment of the trust to a small number of persons.[64]

Here again we find that the essence of the offense for which impeachment will properly lie is "the abuse or violation of some public trust," the exact definition of which must be in the "awful discretion . . . of a court of impeachment." There is here a justification for a legislative check on the executive, not in terms of a vote of no confidence, but only in response to a presidential violation of the high duties of his office. There is certainly not to be found here any intimation that the function of impeachment is to afford a tribunal for the trial of criminal offenses. Hamilton is rather suggesting that the reason for not utilizing a court for the trial of impeachments is exactly because the issues are so different from those that are meet for the ordinary criminal law processes.

We find this position underlined in a later paper, No. 70, also by Hamilton, in which he is justifying the resort to an executive of but a single man. There he notes: "Responsibility is of two kinds—to censure and to punishment. The first is the more important of the two, especially in elective office. Man, in public trust, will much oftener act in such a manner as to render him unworthy of being any longer trusted, than in such a manner as to make him obnoxious to legal punishment . . . ."[65]

The reading given by Hamilton was also given by Madison when he described the Constitution to the electors of Virginia. At that time, despite some of the qualms he had expressed in the 1787 Convention, Madison urged that incapacity, negligence, or perfidy of the President should be grounds for impeachment.[66] And it was Madison, too, who asserted that the unwarranted removal from office by the President of a worthy official would warrant impeachment of the President.[67] And, as

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[64] *Id.* at 398.

[65] *Id.* No. 70, at 427.

[66] 5 J. Elliot, Debates on the Adoption of the Federal Constitution 341, 528 (1907) [hereinafter cited as Debates].

[67] 4 *id.* at 380. *See also* 3 *id.* at 498.

a Representative in the First Congress, Madison asserted that the President was subject to impeachment even for the wrongdoings of those whom he had appointed to office,[68] a vicarious liability we have never created for all "indictable offenses."

The Hamiltonian concept of the basis for impeachment, breach of trust and abuse of office, found support time and again in the ratifying conventions. Pinckney in South Carolina asserted that impeachment would lie against those who betrayed their "public trust."[69] Randolph at the Virginia convention talked of impeachment for misbehavior;[70] Madison noted the possibility of impeachment if the President afforded protection to miscreants;[71] Thomas Iredell argued for impeachment in the event that the President gave false information to the Senate;[72] Archibald MacLaine in South Carolina referred to impeachment for "any maladministration in his office";[73] and Samuel Stillman in Massachusetts stated that impeachment would lie for "malconduct."[74]

Thus, both at the Convention that framed the Constitution and at the conventions that ratified the Constitution, the essence of an impeachable offense was thought to be a breach of trust and not a violation of the criminal laws. And this comported with the function that impeachment was to perform—removal from and possibly disqualification for office, not the ordinary criminal sanctions of fine, punishment, or imprisonment.

E. The Commentators

If neither English history nor the debates that framed the Constitution and its ratification suggested the necessity for an indictable crime as a base for an impeachment, neither did the commentators on the Constitution come to that conclusion. James Wilson, in his lectures on the Constitution wrote: "In the United States and in Pennsylvania, impeachments are confined to political characters, to political crimes and misdemeanors, and to political punishments."[75] He had already defined "high misdemeanors" as a "malversation in office."[76] And the Oxford Dictionary tells us that, even then, "malversation" meant "corrupt behavior in an office of trust."

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[68] 1 ANNALS OF CONGRESS 387 (1789) [hereinafter cited as ANNALS].
[69] 4 DEBATES 281.
[70] 3 *id.* at 117, 201, 486.
[71] *Id.* at 498.
[72] 4 *id.* at 127.
[73] *Id.* at 47.
[74] 2 *id.* at 168-69.
[75] 1 THE WORKS OF JAMES WILSON 427 (R. McCloskey ed. 1967).
[76] *Id.*

Joseph Story asserted that ordinary crimes would afford a base for impeachment, but that the constitutional provision authorizing impeachment was broader than that. In 1833, he wrote:

> Not but that crimes of a strictly legal character fall within the scope of the power. . . ; but that it has a more enlarged operation, and reaches what are aptly termed, political offenses, growing out of personal misconduct, or gross neglect, or usurpation, or habitual disregard of the public interests, in the discharge of the duties of political office. These are so various in their character, and so indefinable in their actual involutions, that it is almost impossible to provide systematically for them by positive law. They must be examined upon very broad and comprehensive principles of public policy and duty. They must be judged of by the habits and rules, and principles of diplomacy, of departmental operations and arrangements, of parliamentary practice, of executive customs and negotiations, of foreign as well as domestic political movements; and, in short, by a great variety of circumstances, as well those, which aggravate, as those which extenuate, or justify the offensive acts which do not properly belong to the judicial character in the ordinary administration of justice, and are far removed from the reach of municipal jurisprudence.[77]

Chancellor Kent, in his *Commentaries*, also clearly delineated the function of the impeachment clause as a means "to prevent the abuse of the executive trust." According to the twelfth edition, edited by O.W. Holmes, Jr.:

> In addition to all the precautions which have been mentioned to prevent abuse of the executive trust in the mode of the President's appointment, his term of office and the precise and definite limitations imposed upon the exercise of his power, the Constitution has also rendered him directly amenable by law for mal-administration. The inviolability of any officer of government is incompatible with the republican theory, as well as with the principles of retributive justice. The President, Vice-President, and all civil officers of the United States may be impeached by the House of Representatives for treason, bribery, and other high crimes and misdemeanors, and upon conviction by the Senate removed from office. If, then, neither the sense of duty, the force of public opinion, nor the transitory nature of the seat, are sufficient to secure a faithful discharge of the executive trust, but the President will use the authority of his station to violate the Constitution or law of the land, the House of Representatives can arrest him in his career, by resorting to the power of impeachment.[78]

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[77] 2 J. Story, Commentaries on the Constitution 233-34 (1833).

[78] 1 Kent's Commentaries on American Law 288-89 (12th ed. O. Holmes 1873).

Holmes took cognizance in a footnote of Professor Dwight's article contending "that there can be no impeachment except for a violation of a law of Congress, or for the commission of a crime named in the Constitution."[79] He also noted that the contrary position was argued in the same law review by Mr. Justice Lawrence. And his chief reference here was to Story's *Commentaries*.

Tocqueville's learning on the impeachment clause is atypically confused. At one time, he asserted: "[T]he Senate is generally obliged to take an offense at common law as the basis of its sentence . . . ."[80] Later he claimed: "A political sentence in the United States may therefore be looked upon as a preventive measure; and there is no reason for tying down the judges to the exact definitions of criminal law. Nothing can be more alarming than the vagueness with which political offenses, properly so called, are described in the laws of America."[81]

F. The American Experience

There have been 13 impeachment proceedings in our history. Some of them have been used as proof that an indictable offense must be proved if conviction is to be valid. In fact, none of them support the thesis, although some lend color to it.

In 1797, William Blount was impeached because of his conduct while a Senator of the United States. The Senate had, before Blount's impeachment, expelled him from membership in that body for "having been guilty of a high misdemeanor, entirely inconsistent with his public trust and duty as a Senator . . . ."[82] The Senate dismissed the impeachment on a three-pronged plea in defense: (1) that a Senator was not a "civil officer"; (2) that since he had already been removed from office, he was no longer subject to impeachment; and (3) that no crime and misdemeanor had been alleged.[83] We are not told on which of the three grounds the decision rested. But usually the case is accepted for the proposition that a member of Congress is not a civil officer. And, indeed, article I contains other provisions for expulsion of a Congressman or Senator.

In 1803, Judge Pickering, a federal district court judge was impeached for: (1) disregarding and intending to evade an act of Congress; (2) refusing to hear testimony on behalf of the United States and entering judgment against the United States; (3) refusing to allow an appeal by the United States; (4) "being a man of loose morals and intemperate

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[79] *Id.* at 343 n.1.

[80] 1 A. TOCQUEVILLE, DEMOCRACY IN AMERICA 108 (P. Bradley ed. 1945).

[81] *Id.* at 110.

[82] 7 ANNALS 43-44 (1797).

[83] 8 *id.* at 2319 (1799).

habits" and appearing on the bench in a state of intoxication and using profanity on the bench.[84] He was convicted in the Senate on all four counts and removed from office.[85]

Certainly the Pickering impeachment is a blot on the scutcheon of American constitutional history. While it is clear that the man should not have been serving as a judge, whether because of chronic intoxication or insanity, the first three charges went to the exercise of his discretion in performance of his judicial functions. They were subject to correction on appellate review and not by legislative judgment on impeachment. Nevertheless, the Pickering case affords no suggestion that an indictable offence is a prerequisite for the impeachment.

The second most famous—or infamous—impeachment in American history was that of Justice Samuel Chase. On the very day that Pickering was convicted in the Senate, the House voted to impeach Chase.[86] There is no doubt that this was part of a deliberate Democratic campaign to loosen the hold of the Federalists on the judicial branch of the government.

Had they charged Chase solely with abuse of his office by using it to political ends, the House might have made a case that would have appealed to the Senate. In fact, only the last of eight articles of impeachment did this. In this article, the House charged that, "disregarding the duties and dignity of his judicial character," Chase perverted "his official right and duty" and addressed a grand jury with "an intemperate and inflammatory political harangue with intent to excite the fears and resentment" of the grand jury and the people of Maryland against their state government and constitution, thus "tending to prostitute the high judicial character with which he was invested to the low purpose of an electioneering partisan."[87] It was on this count that a majority, 19 to 15, but not the necessary plurality, voted to convict.[88] The other charges were, as in the Pickering case, essentially claims that he misapplied the law.

It is said of the Chase case that the failure of conviction must be attributed to a decision by the Senate that there must be a charge cognizable as an indictable offense to justify an impeachment. There is nothing in the record to justify such a conclusion, although that issue was certainly raised by the defense counsel who included Luther Martin.[89] Most students of the period believe that John Randolph, the spon-

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[84] 13 *id.* at 319-22 (1803).
[85] *Id.* at 367-68.
[86] *Id.* at 1180.
[87] 14 *id.* at 731 (1804).
[88] *Id.* at 665-69.
[89] P. Clarkson & R. Jett, Luther Martin of Maryland 206-28 (1970).

sor and manager of the Chase impeachment, demonstrated a political radicalism and irresponsibility in his prosecution that put off not only the Federalists in the upper house but many of the Republicans as well, and that even Thomas Jefferson preferred to see Randolph's cause lost.[90] Nevertheless, it must be conceded, there is some extra-record testimony that supports the proposition about the need for an indictable offense. For example, George Clinton, a New York aristocrat who had fought the Constitution's adoption tooth-and-nail, writing to one of the Van Cortlandts (it is said that in the New York of this day the Clintons spoke only to the Van Cortlandts), stated:

> I will only observe that several of the members who voted for his acquittal had no doubt but the charges against him were substantiated and of course that his conduct was unproper and reprehensible, but considering that many parts of it were sanctioned by the practice of other Judges ever since the commencement of the present Judiciary systems and that the act with which he was charged was not prohibited by any express and positive law they could not consistently with their ideas of justice find him guilty of high crimes and misdemeanors. It was to such refined reasoning of some honest men that he owes his acquittal.[91]

But Clinton, although he was to become Vice-President of the United States at the next election, was not at that time a member of the Senate. Nevertheless, he was clearly correct in his assertion that the behavior attributed to Chase was of the kind that others, including John Jay, had readily indulged.[92]

In 1832, a District Judge James H. Peck was impeached for imprisoning an attorney for contempt because the attorney had published articles critical of the judge's performance on the bench. The charge was that Peck had behaved in a way that constituted "great disparagement of public justice, the abuse of judicial authority, and . . . the subversion of the liberties of the people of the United States."[93] There was no suggestion of violation of a criminal statute. Instead the issues raised at the trial concerned wrongful intent and whether the judge had exceeded the authority conferred by Section 17 of the Judiciary Act of 1789 in holding the lawyer in contempt. The Senate acquitted the judge, with 21 Senators for conviction and 22 for acquittal.[94]

There was no impeachment thereafter until District Judge West H.

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[90]*See, e.g.*, R. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 102-07 (1971).

[91]*Id.* at 102.

[92]*See* Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127, 129-55.

[93]6 CONG. DEB. 413 (1830).

[94]7 *id.* 45 (1831).

Humphreys was impeached in 1862.[95] Essentially, the charges were that he joined the Confederacy in what the House termed "the rebellion," in what we have come to know as the Civil War, and in what is still referred to in the states that were the Confederacy as "the War between the States." Humphreys was not served with process and did not defend against the charges. The Senate convicted on all counts but one. There can be little argument that, although there were no direct references to the criminal laws, the charges were adequate under any theory of the impeachment clause.

The only Presidential impeachment in American history—indeed, the only serious move towards Presidential impeachment before the Nixon presidency—occurred in 1868. Andrew Johnson was impeached essentially for discharging Secretary of War Stanton and appointing his replacement in violation of the Tenure of Office Act.[96] There were 11 counts, the 10th of which asserted that Johnson:

> unmindful of the high duties of his office and the dignity and proprieties thereof, . . . designing and intending to set aside the rightful authority and powers of Congress, did attempt to bring into disgrace, ridicule, hatred, contempt, and reproach, the Congress of the United States, . . . to impair and destroy the regard and respect of all the good people of the United States for the Congress [made] certain intemperate, inflammatory, and scandalous harangues, [thereby also subjecting the office of the presidency to] contempt, ridicule, and disgrace, to the great scandal of all good citizens.[97]

Once again, this time through the sagacious former Justice of the Supreme Court, Benjamin Curtis,[98] the defense in the Senate claimed the necessity for alleging an indictable offense. And the claim is still made that the failure of conviction constitutes proof of the need for such an offense as a base for an impeachment. The difficulty, however, is that at least several of the counts did in fact purport to allege indictable offenses. There is no basis in the record to suggest that the conviction failed for want of an indictable offense. Nor should it be forgotten that on the three articles of impeachment that were brought to a vote in the Senate, 35 Senators voted guilty and 19 voted not guilty. Thus there was clearly a large majority in favor of the sufficiency of the articles.

The act of acquittal of President Johnson in the Senate has been greatly romanticized by many, including no less a personage than John

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[95] CONG. GLOBE, 37th Cong., 2d Sess. 2953 (1862).

[96] *Id.* 40th Cong., 2d Sess. 1400 (1868); Act of March 2, 1867, 14 Stat. 430 (1867).

[97] CONG. GLOBE, 40th Cong., 2d Sess. 1638-39, 1642 (1868).

[98] See 2 B. CURTIS, THE LIFE AND WRITINGS OF B.R. CURTIS 343-422 (1879).

Fitzgerald Kennedy.[99] So long as the behavior of the Radical Republicans was deemed reprehensible as it was by most historians of the period, Johnson's victory over the Radical Republicans was proclaimed as the conquest of truth and justice. But with the subsequent dominance of revisionists in the teaching of American post-Civil War history, there has been a consequent whitewashing on the fanatic Republican chastisers of Johnson.[100] And only recently Michael Les Benedict has published a book—it is a good book—justifying the impeachment of President Johnson.[101]

Even revisionist historians, however, suggest that the Johnson impeachment did not fail for want of charges of indictable offenses. They could hardly do otherwise, since, except for the tenth article quoted above, each of the articles allegedly charged an indictable offense. The failure of the impeachment of Johnson can be attributed to the judgment by one-third of the Senators plus one that the grounds for removal from office were inadequate, and that proof of the kind of breach of trust, of malversation, calling for such expulsion was not sufficient. Thus, Eric McKittrick, one of the revisionist historians, describes the reason for the failure of a guilty verdict in the Johnson case:

> The impeachment was a great act of ill-directed passion, and was supported by little else. . . . Most people, including the noblest of the recusant Senators, were sick to death of Andrew Johnson and would have given much to see the end of him. But this could be accomplished neither by a popular referendum nor by a legislative vote of "no confidence," though either one would have settled his fate in an instant, and in either event the zeal of Trumbull and Fessenden would have been only too available. But the only form open was that of a judicial trial, and matters had reached such a pass that many men were quite willing to stretch their principles all out of shape, to seize upon any form at all that was plausible, and to face their consciences later. "Not a loyal tongue will wag against impeachment," Representative Blair was assured by a constituent from Flint, Michigan; "The people want rest." Yet political principles were one thing, legal principles quite another. The Tenure of Office Act, thanks to the equivocations of a joint conference committee back in February, 1867, was quite unable to bear the intense legal scrutiny to which it was subjected during the trial of Andrew Johnson. The President's counsel, men of the very highest character and ability, showed rather mercilessly how little protection

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[99]See J. KENNEDY, PROFILES IN COURAGE 146-71 (1956).

[100]*See, e.g.*, W. BROCK, AN AMERICAN CRISIS: CONGRESS AND RECONSTRUCTION, 1865-67 (1963); J. FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR (1961); K. STAMPP, THE ERA OF RECONSTRUCTION, 1865-77 (1965), H. TREFOUSSE, THE RADICAL REPUBLICANS: LINCOLN'S VANGUARD FOR RACIAL JUSTICE (1968).

[101]M. BENEDICT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON (1973).

> the Act really gave to Lincoln's holdovers, and they argued most effectively that nothing treasonable could be found in the President's effort to test a law which he considered unconstitutional. The Managers of Impeachment, whose composite personality was a curious blend of demagogue and rascal, were not really able to give them much of a battle. More than one observer must have cringed at the spectacle.[102]

What Curtis and his co-counsel did was to demonstrate to the satisfaction of 19 of the 54 Senators that Johnson did not betray the trust that inheres in the highest office in the Land, that he was not required to enforce a law he believed to be unconstitutional without judicial validation to the states.

The facts, however, have not stopped many from arguing that Curtis had been proved right because those 19 Senators voted with his illustrious client. The general conclusions of the aficionados of the imperial presidency have tended to mix "memory and desire" in their expression about the meaning of the Johnson impeachment. Thus, James McGregor Burns wrote:

> If Johnson had not barely escaped conviction, a precedent would have been set for the easy dismissal of a President less on legal grounds than on political. Given the constitutional ambiguity over the division of legislative and executive power, . . . given also the many conflicting precedents and doctrines of previous Presidents. . . , it would always have been possible to impeach an aggressive or intractable President on grounds that he was violating the Constitution or the statutes. Even the threat of impeachment would have been a potent weapon for congressmen. As it turned out, the most unpopular President after Johnson could calculate that if impeachment had not worked under the conditions of 1868, it never would. Impeachment became something like the nuclear arm—a weapon too potent to be used in warfare over limited objectives.[103]

No doubt Burns did not want to see the President confined by "the Constitution or statutes" of the United States. And he has not been. No doubt, too, Burns was right in his prediction that "the most unpopular President after Johnson [would] calculate that if impeachment had not worked in 1868, it never would."[104]

An impeachment was brought against District Judge Mark H. Delahay in 1873.[105] He was not charged with violations of the criminal law but rather "that his personal habits unfitted him for the judicial office,

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[102] E. McKitrick, Andrew Johnson and Reconstruction 506-07 (1960).

[103] J. Burns, Presidential Government 52 (1966).

[104] *Id.*

[105] Cong. Globe, 42d Cong., 3d Sess. 1900 (1873).

that he was intoxicated off the bench as well as on the bench."[106] But, because of Delahay's resignation, the impeachment was never brought to the Senate for trial.

In 1876, Secretary of War William Belknap was impeached for selling appointments to a military post trader.[107] Certainly, despite the respectability of the practice in English history, this must have constituted a crime under the laws of the United States. Belknap had resigned before the impeachment was voted by the House. But the case was brought to trial anyway. He was acquitted on each count, because, although a majority found him guilty, the needed plurality was not available. Of the 25 Senators who voted not guilty, however, 22 were of the opinion that the Senate lacked jurisdiction because of the prior resignation.[108]

District Judge Charles Swayne was impeached in 1905,[109] pursuant to a resolution adopted the previous year.[110] He was accused of false claims on his travel vouchers, improper use of private railroad cars on a road in receivership in his court, "maliciously and unlawfully" imprisoning two attorneys for contempt, and not being a bona fide resident of the district in which he was sitting which, strangely enough, was designated by statute as "a high misdemeanor." A majority of the Senate voted acquittal on every article, although the facts strongly supported the charges.

Judge Robert W. Archbald was impeached primarily for using his office to persuade litigants before him to provide him with advantageous business deals.[111] Archbald's misbehavior occurred both while he was a judge of the ill-fated and short-lived Commerce Court and before that as a district court judge. Archbald was convicted on 5 of the 13 articles of impeachment.[112]

Judge English, still another federal district court judge who soiled the judicial robe, resigned after he was impeached. Although the House Managers contended that his resignation did not destroy the jurisdiction of the Senate to convict on the impeachment charges, they recommended abandonment of the proceedings, and that was agreed to by the House.[113]

The case of Judge Harold Louderback afforded some interesting

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[106] *Id.*
[107] 4 CONG. REC. 1426-33 (1876).
[108] *Id.* at 343-54.
[109] H.R. REP. No. 3477, 58th Cong., 3d Sess. (1905).
[110] 39 CONG. REC. 247-48 (1904).
[111] 48 *id.* at 9051-54 (1912).
[112] S. Doc. No. 1140, 62d Cong., 3d Sess. 1620-49 (1913).
[113] 68 CONG. REC. 302 (1926).

variations. The Judiciary Committee, after an investigation, recommended censure rather than impeachment.[114] A minority of the Committee, those who had voted for impeachment, took the issue to the floor of the House where they moved five articles of impeachment. They carried the vote by 183 to 142.[115] Essentially Louderback was charged with favoritism in the appointment of receivers and of allowing them excessive fees. He was not convicted by the Senate, although on the fifth of the articles the vote was 45 for guilty, 34 not guilty.

The last of the American impeachment cases to date was that of another District Judge, Halsted L. Ritter. He was charged with actions that constituted solicitation of a bribe, practicing law while a judge, false income tax returns, extortion, and an omnibus charge of misconduct that made reference to six counts of specific misdoing.[116] He was acquitted on each of the substantive counts—although on the first of them the vote was but one away from the necessary two-thirds. He was convicted on the omnibus count by a vote of 56 to 28.[117]

Judge Ritter was the only accused in an impeachment proceeding to seek judicial review. He collaterally attacked the Senate judgment by a suit in the Court of Claims asserting a right to his salary. The Court of Claims dismissed the action on the ground that the Senate decision was binding and unreviewable.[118] The Supreme Court denied Ritter's petition for certiorari.[119] But that was way back in 1936 and 1937, when courts were more reluctant to assume the role of the omniscient and omnipotent, a reticence that no longer exists. I shall, after a short excursion, briefly return to the question of judicial review of impeachment proceedings.

I submit that, as in English history, the American experience under the impeachment provisions of the Constitution, the records of the 1787 and ratifying conventions, and the arguments of authoritative commentators lend little credence to the notion that "high crimes and misdemeanors" are confined to serious infractions of enacted criminal law. Certainly a violation of criminal law by a highly placed government official could constitute a "high crime or misdemeanor," but only if it constitutes behavior showing that the office and the trust implicit in that office has been so abused as to require removal from office and possibly disqualification from holding any other office. Such sanctions as these, the only ones permissible under the constitutional provisions,

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[114]76 *id.* at 4913 (1933); H.R. Rep. No. 2065, 72d Cong., 2d Sess. (1933).
[115]76 Cong. Rec. 4925 (1933).
[116]80 *id.* at 3066-92 (1936).
[117]S. Doc. No. 200, 74th Cong., 2d Sess. 637-38 (1936).
[118]Ritter v. United States, 84 Ct. Cl. 293 (1936).
[119]300 U.S. 668 (1937).

are tailored to abuse of trust, to malversation, and not as punishment for criminal offenders.

Indeed, the function of the impeachment provisions and the mode of presentation of charges and trial thereon would be trivialized by simply treating them as alternative forums for the criminal trials of highly placed officials. We do not and have not had a nobility that might claim a right to trial by peers of the realm for all criminal offenses. That was clearly left behind by the Revolution and the new Constitution which provides, as we know, that: "No Title of Nobility shall be granted by the United States . . . ."[120] And we know that the impeachment provisions themselves relegate even those who have been impeached and convicted to the ordinary criminal processes for trial and punishment. The purpose of the impeachment provisions was not to afford a duality of trials for criminals who held national office. These provisions were framed to protect the people from abuse of the powers that office carried with it. To require a violation of a criminal law that would justify an indictment would be to elevate form over substance. To say that the words crime and misdemeanor have but a single meaning requires us to disregard history and function.

Nor should we demean the Constitution on the ground that such a reading would afford more protection for the officeholder against the claims of those who would remove him. There are two reasons why this is not necessarily so. First, we should recognize that in this day and age it is not at all difficult to find behavior that constitutes a colorable crime, even behavior of the most highly placed. One need only take a cursory glance at the annotations to the criminal code provisions dealing with conspiracy, with mail fraud, and with tax evasion to recognize how easy it is to frame an indictable offense as the basis for a charge of impeachment. Indeed, in terms of the Watergate affair, a book published even before commencement of the House impeachment process spelled out over 163 pages of criminal offenses that could be charged to the Chief Executive of this nation.[121] The fact that the Chief Executive himself has adopted the notion that impeachment will lie only for a violation of the criminal law cannot justify acceptance of so demeaning a concept of the constitutional provisions.

There is a second reason to reject the notion that an impeachment should be treated as a mere trial for criminal conduct in order to afford greater protection for the accused. An impeachment trial is itself an act of state. It is a judgment on whether a duly elected or appointed official has proved himself unworthy of the trust bestowed upon him. This is

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[120]Art. I, § 9, cl. 8.

[121]R. DOBROVIR, THE OFFENSES OF RICHARD M. NIXON (1973).

not merely a question whether certain forbidden or required acts were or were not performed. It may well be that all of the acts charged were committed, but that a conviction on impeachment ought not, nevertheless, be forthcoming. That is the real meaning of the American experience as revealed, not least by the Chase and Johnson impeachment trials. That surely was the understanding that the Founding Fathers must have gathered from the English experience.

Thus, of the impeachment trial of Warren Hastings, Lord Macaulay wrote: "The plain truth is that Hastings had committed some great crimes."[122] And he also wrote:

> It was also felt that, though in the ordinary course of criminal law, a defendant is not allowed to set off his good actions against his crimes, a great political cause should be tried on different principles, and that a man who had governed an empire during thirteen years might have done some very reprehensible things, and yet might on the whole be deserving of rewards and honours rather than of fine and imprisonment.[123]

That, too, I submit was the judgment of the Senate in the Chase and Johnson impeachments. And just as the growing distaste for Burke and his principles affected the judgment in the Hastings case, so too did the distaste for Randolph and his objectives in the Chase trial and for Ben Butler and his designs in the Johnson trial contribute to the Senate dispositions. And rightly so.

An impeachment trial is the only form of a State Trial known to American constitutional jurisprudence. It is a political trial in the true sense of that term. We should not diminish it by turning it into a run-of-the-mill criminal procedure, with the Senate of the United States substituting for a jury and the House of Representatives as surrogate for a district attorney. We must not "grasp at a shadow while the substance escapes"; we should not "cheat ourselves with words and forms."[124]

III. Vicarious Responsibility

One of the questions frequently posed in the Watergate context is whether the putative defendant is impeachable for the misdeeds of his subordinates. The question cannot, of course, be answered in the abstract. But once again we can start with some enlightenment from Alexander Hamilton, who illumined both this problem and the antecedent one of what is meant by an impeachable offense, when he wrote No. 70 of *The Federalist*:

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[122]6 Life & Works of Lord Macaulay 619 (Edinburgh ed. 1897).

[123]*Id.* at 637-38.

[124]McGovern v. City of New York, 234 N.Y. 377, 392, 138 N.E. 26, 32 (1923) (Cardozo, J.).

> Responsibility is of two kinds—to censure and to punishment. The first is the more important of the two, especially in an elective office. Man, in public trust, will much oftener act in such a manner as to make him unworthy of being any longer trusted, than in such a manner as to make him obnoxious to legal punishment.[125]

He argued from this premise in support of a single executive rather than a plural executive, because

> the plurality of the Executive tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power, *first*, the restraints of public opinion, which lose their efficacy, as well on account of the division of the censure attendant on bad measures among a number, as on account of the uncertainty on whom it ought to fall; and, *secondly*, the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office, or to their actual punishment in cases which admit of it.[126]

Hamilton went on to argue against the propriety of a council, such as existed in England because "in a republic . . . every magistrate ought to be personally responsible for his behavior in office."[127] And, in "the American republic, [a council] would serve to destroy, or would greatly diminish, the intended and necessary responsibility of the Chief Magistrate himself."[128]

The notion of responsibility and, therefore impeachability, of the Chief Executive for the acts of his subordinates was a frequent theme expressed at the time of the ratification of the Constitution and immediately thereafter. Madison's statement as a Congressman in the first Congress has been frequently repeated. In arguing for Presidential authority to remove executive officials, he asserted that the Chief Executive would thereby become responsible for their conduct. This power then would "subject him [the President] to impeachment himself, if he suffers them to perpetrate with impunity high crimes or misdemeanors against the United States, or neglects to superintend their conduct, so as to check their excesses."[129] This standard is not, as some have suggested, a standard of absolute liability, as the words "suffer" and "neglect" make clear. Gerry, on the other hand, asserted that the President could not be impeached for the actions of these appointees, because these subordinates would themselves be subject to impeachment for

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[125]THE FEDERALIST No. 70, at 427 (Mentor ed. 1961) (A. Hamilton).

[126]*Id.* at 442-43.

[127]*Id.* at 443.

[128]*Id.*

[129]1 ANNALS 387 (1789).

their own wrongdoing and should assume their own responsibility.[130]

In another exchange on vicarious responsibility, this time at the Virginia ratifying convention, George Mason arguing against ratification, suggested that the President might "pardon crimes which were advised by himself" or try to "stop inquiry and prevent detection."[131] To this Madison responded that "if the President be connected, in any suspicious manner, with any person, and there be grounds to believe he will shelter him, the House of Representatives can impeach him."[132]

These assertions, however, are but slight reeds on which to rest a conclusion about vicarious responsibility. Nor does the language of the Constitution itself afford a sure guide. Clearly, the Constitution does vest "the executive power," presumably all of it, "in a President." In article II, he is also charged with an oath "faithfully [to] execute the Office of President," and with the duties to "be Commander in Chief of the Army and Navy" as well as to "take Care that the Laws be faithfully executed." But these charges can hardly be said to make him an insurer for the activities of his subordinates. For example, no one suggested at the impeachment of Secretary Belknap that his defalcations might warrant impeachment of President Grant simply because Belknap was a subordinate of the President's. Indeed, the Grant administration, of which Belknap was a member, was rife with corruption. When the Congressional investigations revealed the "Whisky Ring" that defrauded the government of millions in taxes, with the collusion of government officials, Grant is reported to have self-righteously asserted: "Let no guilty man escape. Be especially vigilant against all who insinuate that they have high influence to protect . . . them." But as Morrison and Commager reported, most of them did escape, including Grant's private secretary Babcock "with the President's connivance."[133]

None of the American—and so far as I can tell none of the English—impeachment precedents suggest removal from office of the principal simply because of the misdeeds of his subordinates. But this reveals again only the absence of authority on which to resolve the issue, not a resolution of it.

I think that the problem is essentially a factual one. I submit that a government official ought not be charged with the acts of subordinates if they were done without his authority or knowledge but only if he directed that those acts be taken or should have known that they were being taken. In the vast area between these two sets of circumstances, I

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[130] *Id.* at 535-36.

[131] 3 DEBATES 497.

[132] *Id.* at 498.

[133] 2 S. MORISON & H. COMMAGER, THE GROWTH OF THE AMERICAN REPUBLIC 73 (3d ed. 1942).

would suggest that the standard to be used is that of Madison, or its equivalent stated by Mr. Justice Rutledge in his dissenting opinion in the *Yamashita* case where he said: " . . . we do not impute [guilt] to individuals, . . . where the person is not charged or shown actively to have participated in or knowingly to have failed in taking action to prevent the wrongs done by others, having both the duty and the power to do so."[134]

So far as impeachment is concerned, the slate is a blank one. The House and the Senate, with the guidance of their many lawyers, will have to frame answers by analogy to common-law notions rather than by precedent. Once again, however, the results may be shaped by whether the proceeding is regarded as essentially a criminal trial or basically a process for removal. The adoption of the rules of agency and responsibility that could be derived from the looseness of our conspiracy doctrines would be a bad choice of example to follow whichever idea of impeachment is adopted. And I would repeat that I think the real problem is not a question of appropriate standards but rather that of ascertaining the facts.

IV. Executive vs. Judicial Impeachment

In 1970, Gerald Ford was managing the initiation of impeachment proceedings against Mr. Justice William O. Douglas.[135] Among the alleged impeachable offenses was publication of an article by Douglas in a magazine which also contained some photographs of nudes and a caricature depicting President Nixon as King George III. Ford would also have included Douglas's associations with Albert Parvin, because he in turn associated with Las Vegas gambling interests, and with Robert Maynard Hutchins, who in turn had associated with radical students. Whatever this revealed about Mr. Justice Douglas's bad taste in choosing his friends and the place where his extrajudicial writings were to be published, there was no suggestion that these associations or publications were illegal. Yet there was no doubt in Mr. Ford's mind that Douglas was guilty of an impeachable offense.[136]

Somewhat embarrassed by his position in the Douglas proceedings that an impeachable offense is anything that the House and Senate want it to be, Vice-President Ford has suggested that the standards for impeachment of judicial officers are different—*i.e.*, lower—than those required for impeaching a President, a Vice-President, or, indeed, any other civil officer of the United States. This position does not derive

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[134]*In re* Yamashita, 327 U.S. 1, 43-44 (1946).

[135]*See* Special Subcomm. on H.R. 920, Final Report, 91st Cong., 2d Sess. (1970).

[136]*See* Kurland, *The Appointment and Disappointment of Supreme Court Justices*, Law & The Social Order 183, 226-37 (1972).

from the language of article II, section 4, for that constitutional provision talks about all those subject to impeachment in the same way. It reads: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Ford's argument—and I must concede that it doesn't originate with Gerald Ford—rests on the provisions of article III, which provides that: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during Good Behaviour . . . ." The argument, a specious one, is that the standard for judicial retention of office is "good behaviour," and good behavior is what Congress wants it to be.

Professor Raoul Berger, like Gerald Ford, was anxious to demonstrate that judges were more easily removable than the standards of impeachment would tolerate. Indeed, it should be remembered that his now-famous book was written as a brief in support of the power to remove judges by means other than impeachment. He derives his argument, however, not from the evidence of the meaning of the term good behavior, as used at the Convention, but on the absence of evidence to contradict his thesis. Let him speak in his own words:

> There is, however, no evidence that the Framers intended to immunize judges whose misbehavior did not ascend to "high crimes and misdemeanors." Nor is there any evidence that they employed "good behavior" in other than its accepted sense—a tenure terminated by misbehavior. Unless, therefore, we are to conclude that the Framers intended that judges whose tenure had been terminated by misbehavior were nevertheless to continue in office,[137] there must be, as at common law, a means of effectuating the termination.[138] And since impeachment cannot serve as the means, the argument for its exclusivity fails. Finally, "good behavior" was employed to guard against legislative and executive tampering with the judiciary, not to insulate judges from removal when they misbehaved. Judicial independence, in short, rises no higher than the "good behavior" tenure in which it is expressed. And the separation of powers only guarantees, it does not alter, the tenure secured by "good behavior"; much less exclude the *judiciary* from removing a judge who has misbehaved.[139]

The fact is that there is much evidence at the 1787 Convention that the phrase "good behavior" was not intended as a standard of conduct but rather as a term of office. Like the 2-year term of the House, the 4-year term of the President, and the 6-year term of the Senate, "good behavior" was used simply to describe a life term for judges.

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[137]I must confess that I don't know what this clause means.

[138]This conclusion is implicit in the erroneous premise.

[139]R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 164-65 (1973).

The argument of both Ford and Berger reduces to the position that with the "good behavior" standard for judges, the impeachment standards are redundancies. The fact of the matter is that the Convention was obviously of exactly the opposite point of view. For them, it was the tenure of "good behavior" that made provision for impeachment a necessity.

Although there was much debate about the length of the presidential term, as there was over the question whether the executive should be single or plural, the Convention consistently called for a lifetime, "good behavior" tenure for the judicial branch.[140]

When Madison presented his argument for life tenure for the executive, it was argued in terms of the necessity for the independence of that branch from the legislature which he said was the same ground as that on which judicial tenure rested. He then added that the success of the plan for a life tenure for the executive "depended upon the practicability of instituting a tribunal for impeachmnts. as certain & as adequate in the one case as in the other."[141]

At this point George Mason, objecting to the tenure proposed for the executive, stated without contradiction that "[h]e considered an Executive during good behavior as a softer name only for an Executive for life."[142] And this rested on the ground that "It wd. be impossible to define the misbehaviour in such a manner as to subject it to a proper trial; and perhaps still more impossible to compel so high an offender holding his office by such a tenure to submit to a trial."[143]

It was a long term of office—the longest proposed each time being tenure during "good behavior"—that consistently called forth a recognition that impeachment was its necessary concomitant. Thus, Madison reports Morris as saying that he "was for a short term, in order to avoid impeachmnts. which wd. be otherwise necessary."[144] And Rufus King would have favored "good behavior" tenure for the executive, and then and only then, he thought, would impeachment be proper.[145]

On August 27, a motion was made to provide for removal of federal judges by a joint address of both houses of Congress; it was resoundingly rejected.[146] And on August 28, long after the "good behavior" tenure for judges had been repeatedly adopted, Mason's notes record that: "No

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[140]*See* 1 FARRAND 21, 116, 226, 230, 237, 244, 247, 292; 2 *id.* at 38, 44, 132, 136, 146, 172, 186, 575.

[141]2 *id.* at 35.

[142]*Id.*

[143]*Id.*

[144]*Id.* at 59.

[145]*Id.* at 67.

[146]*Id.* at 423, 428, 429.

mode of impeaching the Judges is established; & the Mode of Indictment & Punishment for all the great Officers of the Government should be disignated—"[147] The fact was that on August 20, it had been moved to request of the Committee a special provision for the method of impeaching judges.[148] But it came to naught when the report suggested that the impeachment of the judges should be—exactly as for other civil officers—by the House of Representatives with trial in the Senate. Thereafter, the provisions in article II for impeachment of "all civil Officers" found its way into the Constitution.

To borrow Professor Berger's form of argument, it may be said that there is not a word in the legislative history at the 1787 Convention to suggest that the standards for impeachment of judges was to be different in any way from those applicable to the President, Vice President, or other civil officers of the United States.

Nevertheless, only if we were to conclude that a violation of the criminal law is the exclusive basis for an impeachment could we say that the conduct that would justify impeachment and conviction of a President is the same as for a judge. For we must recognize that different governmental offices impose different fiduciary obligations on those who occupy them. For example, it should be clear that a Presidential decision that is a response to partisan political pressures cannot be thought to be a basis for impeachment. On the other hand, a judge's decision in response to partisan political pressures should certainly be a basis for impeachment. The action on the part of the President would not constitute a breach of trust, while the very same action by a judge would be a violation of that trust. It is in this regard, and only in this regard, that it might be said that the basis for judicial impeachment may differ from the basis for impeachment of other civil officers of the United States.

V. Sanctions

I have already suggested the major difference between American and English impeachment procedures. The former was conceived as a means for removal from office, a means of making the officeholder responsible for the conduct of his office to those on whose behalf he was exercising governmental power. The British tradition utilized impeachment for this objective, but it also was concerned with punishment for the miscreant. This difference may demonstrate only that the American system is a late 18th-century device while the English was a derivative of feudal government. But the difference was not an accidental one. The to-be-formed United States did not choose to imitate the fatherland's

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[147] 4 *id.* at 56.

[148] 2 *id.* at 337, 344.

traditions of constructive and retrospective treason, as is witnessed by the constitutional definition of treason in article III, section 3, and of the equally abhorrent notion of a bill of attainder that was banned by article I, section 8, clause 3. Insofar as impeachment was connected in English history with these two forms of exacting punishment for being on the losing side in a political contest, it was severed from that history by the provision of article I, section 3, clause 7, which reads: "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States."

This conception of the limited role of the impeachment sanction seems to have been undisputed in the Convention. It appeared in the August 6 draft and was unanimously agreed to on August 9.[149] The only change that was offered was to provide for the suspension of the official between impeachment and trial. This change, moved by Rutledge and Morris, was successfully defeated by Madison's objection:

> The President is made too dependent already on the Legislature by the power of one branch to try him in consequence of an impeachment by the other. This intermediate suspension, will put him in the power of one branch only—They can at any moment, in order to make way for the functions of another who will be more favorable to their views, vote a temporary removal of the existing magistrate—[150]

The connection of impeachment with bills of attainder and treason was made in the Convention, however, at the very time that the terms "high crimes and misdemeanors" came into the draft of the Constitution. Mason, it will be recalled,[151] wanted to add "maladministration" to which Madison objected and the "high crimes and misdemeanors" language was approved. Mason's argument was: "Attempts to subvert the Constitution may not be Treason as above defined. As bills of attainder which have saved the British Constitution are forbidden, it is the more necessary to extend: the power of impeachments."[152]

Despite this expression of Mason that "bills of attainder . . . saved the British Constitution," its abolition by the terms of the proposed American Constitution had raised no debate whatever, although a real question was raised as to the need for the "ex post facto clause." It is somewhat surprising, therefore, that the sanctions of a conviction on impeachment were not limited to removal, which was all that the Con-

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[149]*Id.* at 187, 438, 576.

[150]*Id.* at 612.

[151]See text accompanying note 59 *supra.*

[152]DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF AMERICAN STATES 691 (H. Doc. No. 398, 69th Cong., 1st Sess., 1927).

vention seemed concerned with in the course of its impeachment debates. But it may well be that disqualification from future office was not regarded as being within the attainder concept until the Supreme Court put it there in the case of *United States* v. *Lovett*[153] in 1946, in which no mention was made of the impeachment provisions. All that can be said on this point is that the sanction of disqualification need not be read as punishment but only as a means for preventing one who has shown himself to be unworthy of the trust of governmental office from again being given the opportunity to abuse that trust.

It will be recalled that the sanctions provided, removal and disqualification, are stated in the conjunctive. Precedents reveal, however, that the Senate may choose not to apply both. Thus, in Judge Ritter's case, the Senate voted not to disqualify him from further office.[154] On the other hand, in the case of Judge English, the Senate expressly voted that both sanctions be applied.[155]

It must be obvious, however, that because the Senate's power on conviction is limited to these two remedies, it is only the second that can be applied where the person charged has already resigned his office. The presence of this power of disqualification is really all that underlies the notion that an impeachment may proceed against a person who has already been removed or has removed himself. Whether that jurisdiction exists is not really clear.

One of our most eminent constitutional scholars asserts with qualification that impeachment proceedings may be maintained against a civil officer no longer in office. Professor Bernard Schwartz has written:

> Resignation does not give a federal officer immunity from impeachment for acts committed while in office. In the very first impeachment proceeding . . . , counsel for the defendant conceded this. "I shall certainly never contend," he declared, "that an officer may first commit an offense and afterwards avoid punishment by resigning his office." The point was squarely settled in 1876 when the Senate held that the resignation of the officer concerned, in anticipation of the impeachment, did not deprive it of jurisdiction to try him. Such holding is consistent with the relevant provision of the organic document . . . .[156]

With all respect, however, Professor Schwartz may be reading more

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[153]328 U.S. 303 (1946). *Cf.* French v. Senate of State of California, 146 Cal. Rep. 604, 80 P. 1031 (1905); Gray v. McLendon, 134 Ga. 224, 67 S.E. 859 (1910).

[154]Ritter v. United States, 84 Ct. Cl. 293 (1936).

[155]68 CONG. REC. 302 (1926).

[156]1 B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: THE POWERS OF GOVERNMENT 113 (1963).

into the decision of the Senate in the case of Secretary of War Belknap than it can carry. It is true that the Senate voted 37 to 29 that it had the necessary jurisdiction to proceed. But it should be noted that the defendant was not convicted, and 22 of the not guilty votes rested on the ground that the Senate lacked the necessary jurisdiction.

In each of the other impeachment cases where the defendant had resigned, however, the proceedings were abated. Thus, in Judge Delahay's case in 1873, where the defendant resigned after the House had voted impeachment, but before it had brought in articles of impeachment, the House decided against proceeding further. And in the case of Judge English, in 1926, after the House had presented its articles of impeachment to the Senate, the judge resigned. The House Managers informed the Senate that they did not wish to proceed further. The Senate voted to dismiss the case by a vote of 70 to 9. There have been other instances where, after formal charges have been taken under consideration by the House Judiciary Committee, the putative defendant has resigned.[157] In each instance, further impeachment proceedings have been abandoned. The summary offered by Joseph Borkin in his book *The Corrupt Judge* is this:

> Figures on the number of judges whose official conduct has been the subject of Congressional inquiry, the first and necessary step in the impeachment process, give some clue to the difficulties of the impeachment procedure. Of the fifty-five judges so investigated, eight were impeached, eight were censured but not impeached, seventeen others resigned at one stage or another on the conduct of the investigation, while the rest were absolved of impeachable misconduct. Added to this are the undetermined number of judges who resigned upon mere threat of inquiry; for them there are no adequate records.[158]

It is apparent, moreover, that some judges have been convicted of criminal activity but were never impeached. Martin T. Manton of the United States Court of Appeals for the Second Circuit is probably the most infamous of these.[159] Judge Warren Davis of the United States Court of Appeals for the Third Circuit was indicted but never convicted.[160] Judge Albert W. Johnson of the Eastern District of Pennsylvania was both indicted and convicted.[161] None of them was impeached.

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[157]*See* J. BORKIN, THE CORRUPT JUDGE 200 (Meridian ed. 1966).
[158]*Id.* at 204.
[159]*Id.* at 25.
[160]*Id.* at 97.
[161]*Id.* at 141.

VI. Judicial Review

Having addressed the principal question of constitutional construction raised by the impeachment provisions, I should like now to address some more tangential ones. And the first of these is whether the impeachment processes assigned by the specific terms of the Constitution exclusively to the House of Representatives, the Senate, and the Chief Justice of the United States in the case of a presidential impeachment, shall be subjected to judicial review. There is, of course, not a word in the language of the Constitution itself to suggest that the judiciary were to have a role in the impeachment process. But then, it is frequently noticed that there is not a word in the language of the Constitution itself to suggest that the courts should have any power of judicial review.[162] The fact that the courts have taken unto themselves this authority in other spheres is offered as the principal reason why they should be permitted, nay commanded, to do so here.[163]

Of course, the more one thinks of conviction on impeachment as nothing more than conviction for an ordinary crime, the more one is inclined to accept the necessity for judicial review. Indeed, if it is only the person that calls for the Senate forum, then as the peers of the English realm once had both a right and a duty to be tried for their criminal activities in the House of Lords,[164] the judicial review can be

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[162]*See* L. Hand, The Bill of Rights 4 (1958).

[163]*See* I. Brant, *supra* note 19, at 182-97 (1972); R. Berger, *supra* note 14, at 103-21.

[164]I cannot resist the desire to insert the following quotation from Maitland here, which the reader may or may not find instructive in the circumstances:

> We remember that if a peer is indicted for treason or felony he is tried if parliament be in session by his peers in the House of Lords, but if parliament be not sitting, then by the Court of the Lord High Steward. The king, since the steward's office had ceased to be hereditary, made some peer High Steward for the occasion, who summoned a number of peers, not fixed by law to hold the trial. This of course enabled the king or his steward to pack the court. An act of 1699 altered this in [the] case of treason, but not in [the] case of felony, by ordering that all peers should be summoned twenty days before the trial. I believe, however, that in no case has this provision taken effect; the last trial in the Court of the High Steward is said to be that of Lord Delamere for treason in 1686. Parliament has sat so regularly year by year that there has been no need for such a court, and since the end of George II's reign there have, I believe, been but four cases of the trial of peers in parliament otherwise than on impeachment. These are Lord Ferrers for murder in 1760, Lord Byron for murder in 1765, the Duchess of Kingston for bigamy in 1776, and Lord Cardigan for murder in 1841.

F. Maitland, Constitutional History of England 318-19 (1961). A footnote attached to the preceding records: "Lord Russell was tried for bigamy in 1901. Lord Halsbury (Lord Chancellor) presided as Lord High Steward. There were also present about 160 Peers, including all the Law Lords who generally hear appeals, and eleven Judges." *Id.* at 319

conceived of as an integral part of due process of law. Although a right of appeal has not yet been established as a constitutional right, where such a right is afforded to some it is expected to be given to all.[165]

The attempt by Judge Ritter, the last civil officer to be convicted of impeachment, to attack collaterally the Senate judgment of conviction, however, proved a failure. What he did was to sue in the Court of Claims for his salary as a district judge on the ground that the removal from office perpetrated by the completion of the impeachment processes was invalid. The Court of Claims, however, gave him short shrift. In an opinion for a unanimous court, Judge Green said:

> We think that when the provision that the Senate should have "the *sole* power to try all impeachments" was inserted in the Constitution, the word "sole" was used with a definite meaning and with the intention that no other tribunal should have any jurisdiction of the cases tried under the provisions for impeachment. [Italics ours.] The dictionary definition of the word "sole" is "being or acting without another" and we think it was intended that the Senate should act without any other tribunal having anything to do with the case. This would be the ordinary signification of the words and this construction is supported by a consideration of the proceedings of the Constitutional Convention and the uniform opinion of the authorities which have considered the matter.[166]

The Court of Claims then surveyed literature on the subject, state court judicial actions rejecting judicial review under their own impeachment provisions, and a dictum in a Supreme Court case, *Mississippi v. Johnson*,[167] where the Court indicated the impropriety of an injunction proceeding to prevent the Senate from sitting on a bill of impeachment brought in by the House.

It must be conceded, however, that the modesty displayed by the Supreme Court in 1867 in the *Johnson* case—again it was Andrew Johnson who was the party defendant—is no longer evident among its more recent exercises of power. Chief Justice Chase's words are instructive if somewhat anomalous today when the courts are more highly regarded as the repository of all wisdom and judgment. "The cult of the robe"[168] did not hold sway when Mr. Chief Justice Salmon P. Chase wrote for the Court:

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n.1. This catalogue, of course, omits the most famous of such trials in the House of Lords, that of the Duke of Denver for murder. *See* D. SAYERS, CLOUDS OF WITNESS (1926).

[165]*See* Griffin v. Illinois, 351 U.S. 12 (1956).

[166]Ritter v. United States, 84 Ct. Cl. 293, 296 (1936).

[167]71 U.S. (4 Wall.) 437, 462 (1867).

[168]*See* J. FRANK, COURTS ON TRIAL 254-61 (1949).

> The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance. The impropriety of such interference will be clearly seen upon consideration of its possible consequences. Suppose the bill filed and the injunction prayed for allowed. If the President refused obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court?[169]

In *Mississippi* v. *Johnson*, the Court ruled that it could neither enjoin the President from enforcing laws of Congress nor could it issue mandamus to him to enforce those laws. It is interesting to note, too, that the Court then thought that failure to enforce Congressional laws—not an indictable crime—could give rise to impeachment.

At least as late as 1937, when it denied certiorari in *Ritter*,[170] the Supreme Court gave no hint that it would be prepared to review judgments of a Senate court of impeachment.

It is not irrelevant that the Constitutional Convention considered giving the Supreme Court the jurisdiction over impeachments and decided against it.

The Committee on Detail's August 6th draft included this provision:

> The Jurisdiction of the Supreme Court shall extend . . . to the trial of impeachments of Officers of the United States. . . . [I]n cases of impeachment . . . this jurisdiction shall be original. . . . The Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) [to] Inferior Courts . . . .[171]

The Convention, in fact, endorsed these provisions on August 27.[172] But, on the motion of Gouverneur Morris who thought the Supreme Court

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[169]71 U.S. at 462.

[170]Ritter v. United States, 300 U.S. 668 (1937).

[171]2 FARRAND at 186.

[172]*Id.* at 423.

an improper forum, the impeachment provision was put off for further consideration.[173]

On September 8, 1787: "Mr. Madison, objected to a trial of the President by the Senate, especially as he was to be impeached by the other branch of the Legislature, and for any act which might be called a [misdemeanor]. The President under these circumstances was made improperly dependent. He would prefer the Supreme Court for the trial of impeachments, or rather a tribunal of which that should form a part."[174] Gouverneur "Morris thought no other tribunal than the Senate could be trusted. The Supreme Court were too few in number and might be warped or corrupted."[175] "Mr. Sherman regarded the Supreme Court as improper to try the President, because the Judges would be appointed by him."[176]

The Convention voted on Madison's motion and rejected it by a vote of nine states to two.[177]

Sherman's position was reflective of an earlier debate in the Convention on the appointment of the judiciary. On July 18, Mason urged:

> The mode of appointing the Judges may depend in some degree on the mode of trying impeachments, of the Executive. If the Judges were to form a tribunal for that purpose, they surely ought not to be appointed by the Executive.[178]

Morris "supposed it would be improper for an impeach. of the Executive to be tried before the Judges."[179] The Convention unanimously agreed to remove from the jurisdiction of the courts the category of "Impeachments of national officers."[180]

Hamilton offered an amendment for consideration at the New York State convention providing that a special court for impeachments be created.[181] And, indeed, the New York ratifying convention unsuccessfully recommended an amendment to that effect:

> That the Court for the Trial of Impeachments shall consist of the Senate, the Judges of the Supreme Court of the United States, and the first or Senior Judge for the time being, of the highest Court of general and ordinary common law Jurisdiction in each State; . . .[182]

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[173] *Id.* at 427.
[174] *Id.* at 551.
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.* at 41-42.
[179] *Id.* at 42.
[180] *Id.* at 46.
[181] 2 THE BILL OF RIGHTS, A DOCUMENTARY HISTORY 902 (B. Schwartz ed. 1971).
[182] *Id.* at 917.

In *The Federalist*, however, Hamilton made it quite clear that the Supreme Court, under the Constitution as written by the national convention was properly excluded from participation. In No. 65, he wrote:

> Where else than in the Senate could have been found a tribunal sufficiently dignified, or sufficiently independent? What other body would be likely to feel *confidence enough in its own situation,* to preserve, unawed and uninfluenced, the necessary impartiality between an *individual* accused, and the *representatives of the people,* his accusers?
>
> Could the Supreme Court have been relied upon as answering this description? It is much to be doubted, whether the members of that tribunal would at all times be endowed with so eminent a portion of fortitude, as would be called for in the execution of so difficult a task; and it is still more to be doubted, whether they would possess the degree of credit and authority, which might, on certain occasions, be indispensable towards reconciling the people to a decision that should happen to clash with an accusation brought by their immediate representatives. A deficiency in the first, would be fatal to the accused; in the last, dangerous to the public tranquility . . . .[183]

Impeachment provisions were not ordinary criminal trials:

> The necessity of a numerous court for the trial of impeachments, is equally dictated by the nature of the proceeding. This can never be tied down by strict rules, either in the delineation of the offence by the prosecutors, or in the construction of it by the judges, as in common cases serve to limit the discretion of courts in favor of personal security. . . . The awful discretion which a court of impeachments must necessarily have, to doom to honor or to infamy the most confidential and most distinguished characters of the community, forbids the commitment of the trust to a small number of persons.[184]

Moreover, the courts might be called on to try the same defendant for at least some of the same charges:

> These considerations seem alone sufficient to authorize a conclusion, that the Supreme Court would have been an improper substitute for the Senate, as a court of impeachments. There remains a further consideration, which will not a little strengthen this conclusion. It is this: The punishment which may be a consequence of conviction upon impeachment, is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence, and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law. Would it be proper that the persons who had disposed of his fame, and

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[183] THE FEDERALIST No. 65, at 398 (Mentor ed. 1961) (A. Hamilton).

[184] *Id.*

> his most valuable rights as a citizen, in one trial, should, in another trial, for the same offense, be also the disposers of his life and his fortune? Would there not be the greatest reason to apprehend, that error, in the first sentence, would be the parent of error in the second sentence? That the strong bias of one decision would be apt to overrule the influence of any new lights which might be brought to vary the complexion of another decision? Those who know any thing of human nature, will not hesitate to answer these questions in the affirmative; and will be at no loss to perceive, that by making the same persons judges in both cases, those who might happen to be the objects of prosecution would, in a great measure, be deprived of the double security intended them by a double trial. The loss of life and estate would often be virtually included in a sentence which, in its terms, imported nothing more than dismission from a present, and disqualification for a future, office. . . .
>
> I forbear to remark upon the additional pretext for clamor against the judiciary, which so considerable an augmentation of its authority would have afforded.[185]

That which Hamilton forbore to remark upon, the exclusion of the judiciary from the political maelstrom of presidential removal procedures, was noted as a happy and necessary choice by later commentators on the question. Thus, Lord Bryce wrote: "Rare as this method of proceeding is, it could not be dispensed with, and it is better that the Senate should try cases in which a political element is usually present, than that the impartiality of the Supreme Court should be exposed to the criticism it would have to bear, did political questions come before it."[186]

The argument is made, however, that the Supreme Court has now survived criticism of its political nature, and its lack of political impartiality, despite the fact that it has so readily in recent years entered into the political thicket. Since we need no longer fear diminution of Supreme Court Authority for this reason, it is suggested that the courts be given authority—or rather assume authority—to review the impeachment processes.

Fifteen years ago, when Professor Wechsler asked the question: "Who . . . would contend that the civil courts may properly review a judgment of impeachment when article I, section 3 declares that the 'sole power to try' is in the Senate?"[187] The expected answer was that nobody would make such a contention. Today, the answer would be that many lawyers and all addicts of judicial supremacy would say that such

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[185]*Id.* at 398-400.

[186]1 J. BRYCE, AMERICAN COMMONWEALTH 107 (2d ed. rev. 1891).

[187]Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 8 (1959).

a power exists in the courts. What happened in the interim was that the Court itself jumped into the political sphere with little hesitation and no doubts about its competence.

There is, of course, no statutory provision for direct review of a Senate judgment by the Supreme Court of the United States or, indeed, by any other federal or state court. Perhaps some theory could be concocted to show that the Senate's judgment was reviewable by one of the prerogative writs. Such a judgment would be a real demonstration of judicial prestidigitation. But the Supreme Court has been adept at lifting itself by its own bootstraps at least since Marshall's day. Indeed, *Marbury* v. *Madison*[188] might be a worthy model on which the Court could fashion an extension of its constitutional authority. As the ultimate authority on the Constitution, it may well be able to see things in that document that cannot be seen by the unannointed; *i.e.*, those who have not taken the judicial oath of office.

More likely the test will be made by indirection. In that event, *Powell v. McCormack*[189] or *Grave v. United States*,[190] or even *United States* v. *Lovett*[191] may well show the way. Irving Brant contends that an improper impeachment would be nothing more than a bill of attainder and therefore must be subject to review as was the legislative act that was condemned in the *Lovett* case.[192] Brant would draw an analogy from the fact that before Congress utilized the courts for enforcement of their contempt orders, contempts of Congress were first held not subject to judicial review on the basis of English precedent[193] but later came within the ken of the judiciary power.[194] It does not matter to Brant that the Constitution particularly authorizes impeachments—a form of removal that was available to Congress but not chosen in the *Lovett* case—at the same time that it condemns bills of attainders and bills of pains and penalties.

In any event, the mode for review suggested by *Lovett,* where three civil servants were forbidden by legislation to receive further compensation for services in the employ of the United States government, was by suit in the Court of Claims for the money to which they claimed to be entitled. This was the mode of review attempted by Judge Ritter and frustrated by the Court of Claims denial of jurisdiction, a denial with which the Supreme Court declined to interfere.

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[188]5 U.S. (1 Cranch) 137 (1803).
[189]395 U.S. 486 (1969).
[190]408 U.S. 606 (1972).
[191]328 U.S. 303 (1946).
[192]*See generally* I. Brant, *supra* note 19.
[193]Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821).
[194]Kilbourn v. Thompson, 103 U.S. 168, 192-200 (1881).

The means for relief in *Powell* v. *McCormack* were different. There Congressman Powell had been reelected to Congress, but the House refused to seat him because of conduct that the House found obnoxious. Article I, section 5 provides: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, ..." It provides further that "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member."

Powell brought a declaratory judgment action in the United States District Court for the District of Columbia for a declaration that he was entitled to his seat. The trial court dismissed for want of jurisdiction over the subject matter. The Court of Appeals affirmed the decision, each judge writing an explanation of his own. It was Judge McGowan's position that, since the House vote was in excess of the two-thirds necessary for expulsion, it was not necessary to decide whether Powell was denied his seat for reasons that were not acceptable to the Constitutional provisions of qualifications for election. The Supreme Court of the United States, in an opinion by Chief Justice Warren, held that the courts had jurisdiction to determine the question and that Powell had been improperly excluded because he had established all the requirements for election specified by the Constitution: He was 25 years of age, 7 years a citizen, and a resident of the State from which he was elected. Mr. Justice Stewart's dissent, the only dissent, rested on the ground that the term of Congress to which Powell had been elected had expired and the case was, therefore, moot.

Warren found that the case presented a proper "federal question." Interestingly enough, the Court declined to address the case in the terms suggested by Judge McGowan, leaving open the issue whether the case would have been justifiable had it been an expulsion rather than an exclusion case. Clearly, too, it did not address itself to the reviewability of an impeachment judgment which, like an exclusion vote, requires two-thirds of the members to sustain. But the Court did, at one point, suggest acceptance of the analogy between the power to seat, the power to exclude, and the power to convict on impeachment. The analogy cannot be carried far. All the Court did was to repeat respondents' contentions that the three were analogous and then to reject the respondents' conclusion that it followed that there was no jurisdiction in the courts. Thus, Warren said:

> Respondents first contend that this is not a case "arising under" the Constitution within the meaning of Art. III. They emphasize that Art. I, § 5, assigns to each House of Congress the power to judge the elections and qualifications of its own members and to punish its members for disorderly behavior. Respondents also note that under Art. I, § 3, the Senate has the "sole power" to try all impeachments. Respon-

> dents argue that these delegations (to "judge," to "punish," and to "try") to the Legislative Branch are explicit grants of "judicial power" to the Congress and constitute specific exceptions to the general mandate of Art. III that the "judicial power" shall be vested in the federal courts. Thus, respondents maintain, the "power conferred on the courts by Article III does not authorize this Court to do anything more than declare its lack of jurisdiction to proceed."
>
> We reject this contention . . . .[195]

There is no indication that the Court, in its judgment, is accepting the respondents' equation of the power to "judge," to "punish," and to "try"; its opinion goes only to the issue of the power of the House to judge the qualifications of its members.

Nevertheless, the opinion, like many of the Warren Court's opinions, reads the judicial authority more broadly than did earlier courts. And it must be conceded that a similar attitude could bring even impeachments within judicial control. Even the opinion in *Powell,* however, acknowledges that the Court may not have the power to order coercive relief rather than simply declaratory relief.[196] And the Court did note, in a footnote, where some of the court's most important law is made, that: "Consistent with [its] interpretation, federal courts might still be barred by the political question doctrine from reviewing the House's factual determination that a member did not meet one of the standing qualifications. This is an issue not presented in this case and we express no view as to its resolution."[197]

The *Powell* case all boils down to the language at the end of the opinion that "it is the responsibility of this Court to act as the ultimate interpreter of the Constitution."[198] And when one asks where the Court gets this authority to act as the "ultimate interpreter" of the Constitution, he quickly finds that it conferred this authority on itself in *Baker* v. *Carr,*[199] allegedly relying on *Marbury* v. *Madison,* which says nothing of the sort.

Mr. Justice Douglas in his separate concurring opinion suggests that the decision in *Powell* would not be binding on an "expulsion" case and, *a fortiori,* it cannot be said to control an impeachment question. Douglas said: "By Art. I, § 5, the House may 'expel a Member' by a vote of two-thirds. And if this were an expulsion case I would think that no justiciable controversy would be presented, the vote of the House

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[195]395 U.S. at 513-14.
[196]*Id.* at 517-18.
[197]*Id.* at 521 n.42.
[198]*Id.* at 549.
[199]369 U.S. 186 (1962).

being two-thirds or more. But it is not an expulsion case."[200]

One might accept the proposition suggested by Professor Martin Shapiro in his analysis of political question jurisdiction in the high court, not as the most propitious solution but as the most likely one. Shapiro wrote in 1964:

> At best then, the whole debate over political questions and reapportionment is inconclusive, leaving the Court perfectly free to choose whatever course it wishes. Actually, however, the proponents of the doctrine seem, to me at least, to lose. Granted that there are certain cases at certain times that a particular court would be well advised, for a variety of reasons, not to decide. Then let them not decide those particular cases at those particular times. The evil of a "political questions" doctrine is that it elevates a single expediential act into a matter of binding Constitutional principle.[201]

What Shapiro and many others like him fail to understand is that there are questions that the Court should not undertake to decide—once having decided to decide some of them, it will necessarily have to decide all of them. Not all political questions are alike, of course. But questions involving the basic conflicts between the legislative and executive branches of the national government will almost always be of sufficient moment to command judicial attention if we concede judicial competence. Or at least the momentum that compels decision of them will constantly increase. And sooner or later, the judicial branch could be ground to dust between the competing forces whose respective powers it is trying to mediate. Just such an ultimate decision could be one that decided that the Senate could not try or convict a President who was impeached by the House of Representatives.

It is clear to me that judicial review of impeachment proceedings was never contemplated by those who wrote the Constitution. It is clear to me that before the decisions of the reapportionment cases, there was no possibility that the judicial branch would undertake such a review. It is, however, equally clear to me that the enhanced self-image of the American judiciary today might very well undertake such decisions, with consequences that could be disastrous, not least for the judiciary itself. The judiciary, as Hamilton noted, has no special information, training, or capacity to render such a decision. It would do well to demonstrate by example rather than edict the proposition that each branch of government ought to stay within the confines set for it by the Constitution and not press at the edges of its authority to see how much power it can accumulate before it engorges itself.

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[200]395 U.S. at 553.

[201]M. SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT 215 (1964).

The perfume of Watergate is the odor of arrogance. It smells no better when worn by the judiciary than when tried on by the executive. The warning of George Washington that each branch should be confined within its own proper area[202] is equally applicable to all three branches.

VII. Alternatives to Impeachment

The Constitution contemplates five ways to end the tenure of the presidential office. The first and historically most common is for the President to serve his full term and not be reelected, either by his choice, by voter preference, or by constitutional disqualification. The second is by death while in office, which unfortunately has occurred a large number of times through either illness or assassination. The third is by impeachment and conviction, which has never occurred. Incapacity, the fourth, did overtake Woodrow Wilson while he was in office, but he remained the titular head of the government while his wife assumed the direction of the United States much as a regent would in a monarchy. The 25th amendment would now provide a mechanism for replacing an incapacitated President for the duration of his incapacity. The fifth means of ending presidential office that is mentioned in the Constitution is resignation. This, too, is a device that has never been utilized.

Despite the patent impossibility that any one man can perform the task and the almost unbearable personal toll that it exacts, no incumbent President has ever voluntarily removed himself from the office during his elected tenure. Some have chosen not to seek reelection while still eligible. But we have no precedents of presidential resignations, even when the country and the Congress have been all but violently opposed to Presidential policies and continued tenure in office. John Tyler and Andrew Johnson epitomize two elements of character that every one of our Presidents—even the all but sainted Abraham Lincoln —have had in common: stubbornness and immodesty. However convinced some of them may have been that they were not capable of meeting the physical and psychological strains, they have remained steadfast in their notions that they were better fit to be President than any other living American available for the post.

We know from recent—and not so recent—events that Vice-Presidents resign.[203] We know from comparatively recent events that even some Supreme Court Justices resign before they have lost their capacities. But we should know from these events, too, that when the resignation is not a voluntary act but is in effect forced upon them by extra-legal pressures, the resignation is an extra-constitutional means of removal.

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[202]See text accompanying note 234 *infra*.

[203]Calhoun resigned the Vice-Presidency in order to take a seat in the Senate in 1833.

There is some irony in the fact that Mr. Justice Abe Fortas was forced to resign at the beginning of the Nixon incumbency by the Nixon staff and by means that were, to me, less than appropriate. You may recall that no specific or official charges of misbehavior were ever levelled. Through official leaks, largely from the White House and other governmental sources, the press published details from which inferences of wrong-doing were readily drawn. There were suggestions that Mr. Justice Fortas received moneys from Mr. Wolfson which were to serve the function of securing Fortas's assistance either in favoring Wolfson in the Supreme Court or securing the favors of the White House in his cause, it was not made clear which.—A repeated Watergate theme. The press insisted that Wolfson was an improper associate for a Supreme Court Justice to have, because he was a businessman who played his games at the edges of legality and far below the high standards of ethics that we all demand of others.—A repeated Watergate theme. There were insistent reports that Fortas's tax returns showed at least tax avoidance if not tax evasion.—A repeated Watergate theme. And there was published evidence of a cover-up by Fortas of his relationship and dealings with Wolfson.—A repeated Watergate theme. The accusers all insisted that a Supreme Court Justice, like Caesar's wife, must be above suspicion. And, with the aid of the Attorney General of the United States, one John Mitchell by name, and the Chief Justice of the United States, who was then Earl Warren, Mr. Justice Fortas was persuaded to resign his post on the high court, continuing to assert his improbable innocence.[201] There is not only a patent factual analogy to the charges against Mr. Nixon, but a clear methodological parallel of the means used as pressure for resignation. I said then, and I believe now, in Mr. Nixon's immortal words, "That was wrong."

A Supreme Court Justice, like a President of the United States, is given a tenure that is supposed to protect his independence and to preclude political pressures from affecting his continuance in office. Unless facts are revealed in an appropriate forum of the kind of wrongdoing that calls for removal from office, resignation without confession of guilt, that which Senator Buckley and Representative Mills have demanded of the President, could be destructive of the constitutional protections that have been afforded to the highest officers of our government. Presidents of the United States, like Supreme Court Justices and other federal judges, cannot be fired, even by the newest and least responsible branch of government, the news media. The news media have an obligation to discover the facts and a duty to reveal the facts. They are not, however, representatives of the people, elected or

[201] *See* R. SHOGAN, A QUESTION OF JUDGMENT (1972).

otherwise. They are self-appointed and responsible to no constituency. They should not be substituted as an extra-constitutional device for removal of officials from our government.

We do not and cannot have Presidents and judges forced out of office simply because they have become unpopular. The duties to be objectively performed by these officials cannot be dependent upon the popularity of each of their acts. It should be remembered that even the John Birch Society called not for Earl Warren's resignation but for his impeachment. Its incapacity to make a case for impeachment in the bodies charged with that function was the very protection of judicial independence that was contemplated by the Constitution. A destruction of these constitutional protections would result from a Presidential resignation that did not include a detailed confession of impeachable offenses. This would seriously undermine our constitutional structure.

I resort once more to *The Federalist*, this time No. 71, again by Hamilton:

> The republican principle demands that the deliberate sense of the community should govern the conduct of those to whom they intrust the management of their affairs; but it does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests. It is a just observation that the people commonly *intend* the PUBLIC GOOD. This often applies to their very errors. . . . They know from experience that they sometimes err; and the wonder is that they so seldom err as they do, beset as they continually are, . . . by the snares of the ambitious, the avaricious, the desperate, by the artifices of men who possess their confidence more than they deserve it, and of those who seek to possess rather than deserve it. When occasions present themselves in which the interests of the people are at variance with their inclinations, it is the duty of persons whom they have appointed to be the guardians of their interests to withstand the temporary delusion in order to give them time and opportunity for more cool and sedate reflection. Instances might be cited in which a conduct of this kind has saved the people from very fatal consequences of their own mistakes, and has procured lasting monuments of their gratitude to the men who had courage and magnanimity enough to serve them at the peril of their displeasure.
>
> But however inclined we might be to insist upon an unbounded complaisance in the executive to the inclinations of the people, we can with no propriety contend for a like complaisance to the humors of the legislature. The latter may sometimes stand in opposition to the former, and at other times the people may be entirely neutral. In either supposition, it is certainly desirable that the executive should be in a situation to dare to act on his own opinion with vigor and decision.
>
> The same rule which teaches the propriety of a partition between

> the various branches of power teaches likewise that this partition ought to be so contrived as to render the one independent of the other.[205]

Calls for Presidential resignation in the course of the Watergate crisis have been many and from diverse sources. Earlier there were the cries for resignation from the political enemies of the incumbent who would be glad to see him leave office at all costs and at any price. Some schemes for departure were extraordinarily complex, almost bizarre. One called for a joint resolution of Congress—passed by two-thirds of each house and, therefore, not subject to Presidential veto—calling for resignation. At that point either the President or Vice-President would resign. The vacancy would be filled by the remaining elected official from a list of three candidates submitted by Congress, and the unresigned member of the victors of the 1972 election would then be replaced by the Congressional choice. This scheme found countenance in the statements of Clark Clifford, one-time member of the Truman White House and later Secretary of Defense under Johnson.[206]

Perhaps more startling were the calls for resignation by persons who could be considered political allies of the President. Congressman Mills, a conservative Democrat, offered Congressional absolution for any crimes that the President may have committed, if only he would resign.[207] Never mind that there is real doubt about the power of Congress to grant pardons before conviction.

The role of Brutus, however, was reserved for Senator James Buckley, who said that a presidential resignation would be an "extraordinary act of statesmanship and courage" that would end "the crisis of the regime" and was necessary because the Watergate affair was doing "irrevocable damage to our entire system of government."[208] Buckley thought that: "The impeachment process cannot possibly resolve the crisis." He reached this conclusion essentially because the impeachment process would, as he put it, be a "Roman circus," in which "the most sordid dregs dug up by the Watergate miners would inflame the passions of the domestic audience and provoke the guffaws, prurient curiosity, or amazement of the outside world."[209]

The response of the *Washington Post* editorial, admittedly not an unbiased observer, seems nevertheless to be sound.

Buckley had said:

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[205]THE FEDERALIST No. 71, at 432-33 (Mentor ed. 1961) (A. Hamilton).

[206]Clifford, *A Government of National Unity,* New York Times, June 4, 1973, at 35, col. 2.

[207]TIME, Jan. 28, 1974, at 14.

[208]Washington Post, March 20, 1974, at A 10, Col. 2.

[209]*Id.* at A 1, Col. 2.

> I do not in the least imply belief that he is legally guilty of any of the hundreds of charges brought against him by those sections of the media that have appointed themselves permanent grand juries and public prosecutors. My proposal reflects no personal judgment on the matter of guilt or innocence and I have none. Nor do I propose Richard Nixon's resignation as a retreat by him or as in any way acknowledging either guilt or weakness.[210]

The *Post* editorial responded:

> To all of which there seems to us one simple answer: then why the hell should he resign?
>
> For the good of the nation Senator Buckley replies and in order to save us the burden and pain of due process, *and in order to avoid the risk our Founding Fathers so thoughtlessly seem to have built into the constitution.* . . .
>
> Maybe we are, after all, closet conservatives—but we believe that Senator Buckley has got the whole thing backwards. If Richard Nixon is not guilty of impeachable offenses, he should neither resign nor be impeached and/or convicted of such offenses. We have every confidence that the people's elected representatives of both parties . . . are fully competent and responsible to make a fair and sober judgment on that question and to do so in consonance with the procedures laid down by the Constitution. . . . Without an official finding, without resolution of questions that have been raised (not just by the media, but *through* the media by grand juries and congressional committees and federal courts as well) and without a recorded judgment on the part of those legislators who are charged with the responsibility for reaching a final judgment, it seems to us that the potential for suspicion and cynicism and resentment would be far larger than if the impeachment proceedings were to go forward.[211]

It seems to me, too, that Buckley's proposal for the equivalent of Nixon's "peace with honor" in Viet Nam ignores the more important need to reveal the facts so that appropriate steps may be taken to afford institutional protections against future abuses that inhere in the imperial presidency. However appropriate the acceptance of Vice-President Agnew's resignation may have been—and there certainly is some doubt remaining about that—it should afford no precedent for a Presidential resignation. It is far more important that the facts be fully revealed than that any individual or individuals be removed from office or punished. The problems of Watergate are not problems of personalities; they are deep-seated perversions of our constitutional form of government that must be corrected now, before it is too late.

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[210] *Id.* at A 14, Col. 1.

[211] *Id.* at A 14, Col. 2.

If I am right about this, then it is possible that neither impeachment nor resignation is the best solution for the ills we suffer. But is there any alternative?

Can we look for a moment at the possibility of legislative censure?

Only once in our history have we had a President impeached. Only once in our history, to my knowledge, have we have a President censured by the legislature. Both actions turned out badly. Of the Johnson impeachment you are already aware. The President who was censured was the people's hero, Andrew Jackson, who had in avoidance if not violation of law removed the Government's deposits from the Bank of the United States in anticipation of causing its demise. It is important to note that although Nicholas Biddle's bank had large support in the Senate, from which the censure issued, it had almost none in the House which did not—and was not asked to—join the censure.

It will be remembered that it was Roger B. Taney's opinion that grounded Jackson's removal of the deposits as a valid act within the Presidential authority. It was James K. Polk who led the forces in the House to support the removal. And it was John C. Calhoun who tried to turn the issue into a question more basic even than the survival of the Bank of the United States. He claimed that "the real question" derived from "a struggle between the executive and legislative departments of the Government; a struggle, not in relation to the existence of the bank, but which, Congress or the President, should have the power to create a bank, and the consequent control over the currency of the country."[212]

Clay and Webster had taken the same position as Calhoun. (There were giants in the Senate in those days.) And Clay's rhetoric was every bit as dramatic as Calhoun's:

> We are . . . in the midst of a revolution, hitherto bloodless, but rapidly tending towards a total change of the pure republican character of the Government and to the concentration of all power in the hands of one man. . . . [I]f Congress do not apply an instantaneous and effective remedy, the fatal collapse will soon come on, and we shall die—ignobly die—base, mean, and abject slaves; the scorn and contempt of mankind; unpitied, unwept, and unmourned.[213]

Calhoun—the first Vice-President to resign and the only one to do so except for Agnew—and Webster and Clay may well have been right in their analysis. Certainly the imperial presidency owes much to the tenure of Andrew Jackson. But they were wrong in seeing it as a battle between Congress and the President rather than between the Senate

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[212]10 CONG. DEB. 218 (23d Cong., 1st Sess. 1834).

[213]*Id.* at 59, 94.

and the President. Jackson had on his side not only the House of Representatives but the people. And he knew it, as he threw back the challenge to those who had censured his actions. "If Congress really meant what the Senate said, Jackson replied, let the House impeach him and the Senate try him."[214]

What Jackson knew and relied upon was the fact that it was impossible to get an impeachment vote through the House. Arthur Schlesinger reads it not as a political tactic but as a constitutional principle. He says:

> Jackson was plainly right. If a President committed high crimes and misdemeanors, censure was not enough. The slap-on-the-wrist approach to presidential delinquency made little sense, constitutional or otherwise. . . . This did not mean, of course, that a fainthearted Congress might not censure a lawless President and pretend to have done its duty. But unless the terms of the resolution made it clear why the President was merely censurable and not impeachable, the action would be a cop-out and a betrayal of Congress' constitutional responsibility.[215]

But was Jackson right, except in his political judgment? Is it required that impeachment proceedings be invoked every time the President is guilty—in the minds of Congress—of having disobeyed legislative mandates? Is it even required to note censure every time this happens? If Schlesinger is right, the approach requires frequent tosses of the dice, with Congress going for broke every time. It would mean that there is no flexibility in the joints, not only of the legislative process but of the Constitution. It would mean that Congress would have to spend almost all of its time on questions of impeachment. For, if Schlesinger is right there would be few, if any, Presidents who did not earn—and will not deserve—an impeachment trial. It is here—and probably only here—that Schlesinger and President Nixon's spokesmen would be in agreement.

It may well be that the events of Watergate had soon gone too far to permit the consideration of the censure alternative. But had the movement been undertaken early, on the basis of the facts developed in the Senate hearings, we might have had a chastened Presidency without the costs of divisions that have sundered the country since. What would Mr. Schlesinger's view be if his choice was between censure on the one hand and no impeachment on the other? Or between impeachment with an acquittal in the Senate; which is likely to prove to be the fact, and which will be treated by the White House as an

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[214] A. SCHLESINGER, THE IMPERIAL PRESIDENCY 411-12 (1973).

[215] *Id.* at 422.

exoneration however close to the two-thirds the vote in the Senate may prove to be.

The fact is that the censure alternative to removal from office has been used and used effectively. A Congress unwilling to impeach—and the attitude of the country despite the people's distaste for the President's management of his office long supported such unwillingness—and equally unwilling to absolve him of fault, could well have effectively resorted to the censure remedy before it was too late. That, indeed, was a choice frequently made by the Senate with regard to questions of expulsions of its own members, as the cases of Senators McCarthy of Wisconsin and Dodd of Connecticut have shown us in recent times. And the House, often unwilling to impeach judges or to expel its own members has far more frequently resorted to censure of both. "Fifteen House Members have been censured. . . . The Senate has resorted to censure on seven occasions."[216] Expulsions, however, like convictions on impeachment, require a two-thirds vote and have been even rarer than such convictions. William Blount of Tennessee was expelled for dealing with the British in 1797. There have been no expulsions from either body, aside from this, except for those members expelled during the Civil War because of their attachments to the Confederacy, when 22 Senators and 3 Representatives were expelled.[217] Of the 55 federal judges subjected to House Judiciary Committee scrutiny, 8 were impeached, of whom 4 were convicted, and 8 were censured.[218]

My argument is not that censure is the proper remedy at this late stage of the Watergate fiasco, but only that it is a weapon that gives a flexibility to the Congressional arsenal that does not force it to the use of what has been described as a device equivalent to nuclear power, the ultimate weapon. I would argue further that the fact that censure proved a failure in the past is not sufficient to cause its abandonment in the present, anymore than the failure of impeachment in the past requires its discard.

Indeed, it might be recognized that neither conviction of impeachment nor censure might be required if the Senate or the House were to undertake a thorough investigation of Presidential misbehavior and then publish its findings. We do have a precedent here in the Covode Committee investigation of the affairs of James Buchanan in 1860. Whether it would be deemed successful in its objectives or not could be the subject of debate. Buchanan had so many things go against him in his attempt to prevent the destruction of the Union that no particular event could be said to have destroyed him as a political force.

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[216]J. KIRBY, CONGRESS AND THE PUBLIC TRUST 210 (1970).

[217]*Id.* at 204.

[218]J. BORKIN, THE CORRUPT JUDGE 204 (Meridian ed. 1966).

The House authorized the special committee under a Pennsylvania Congressman, John Covode, the same man who was later to introduce the impeachment resolution against Johnson, to inquire "into the Executive use of money, patronage, or other improper means to influence Congress or the administration of the laws."[219] Buchanan tried Jackson's ploy in response to the Senate censure, but it failed. Buchanan's words are necessarily instructive, however, because they ring bells that we are still hearing. He said that "the Constitution has invested the House of Representatives with no power, no jurisdiction, no supremacy whatever over the President," except in the event of impeachment proceedings.[220] He continued:

> In all other respects, he is quite as independent of them as they are of him. As a coordinate branch of the Government he is their equal. Indeed, he is the only direct representative on earth of the people of all and each of the sovereign States. To them, and to them alone, is he responsible whilst acting within the sphere of his constitutional duty, and not in any manner to the House of Representatives. The people have thought proper to invest him with the most honorable, responsible, and dignified office in the world, and the individual, however unworthy, now holding this exalted position, will take care, so far as in him lies, that their rights and prerogatives shall never be violated in his person, but shall pass to his successors unimpaired by the adoption of a dangerous precedent. He will defend them to the last extremity against any unconstitutional attempt, come from what quarter it may, to abridge the constitutional rights of the Executive and render him subservient to any human power except themselves.[221]

The expected harangue eventuated. Sherman of Ohio said that Buchanan was confusing himself with Charles I and Louis XIV and adopting the monarchial position that the king can do no wrong. And Buchanan referred to the House investigation as a "Star Chamber" and the "Revolutionary Tribunal of France in the days of Robespierre."[222] The House Judiciary Committee to which his protest was referred, presented a resolution to the whole House, which was adopted by that body by a vote of 88 to 44, rejecting the President's position.

Let Allan Nevins characterize the resulting report of the Committee.

> Covode's friends extolled, and his foes denounced, the inexorable thor-

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[219]2 A. NEVINS, THE EMERGENCE OF LINCOLN 196 (1950).

[220]5 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 615 (1897).

[221]*Id.*

[222]Warren, *Presidential Declarations of Independence,* 10 BOSTON U.L. REV. 1, 19 (1930).

> oughness of his work. . . . The complete testimony filled eight hundred pages; but the gist of it was summed up in the final majority report which the Republican press spread broadcast before the end of June.
>
> Seldom in our history has a Congressional investigation furnished material more damaging to a President and his coadjutors. Its most disturbing evidence was the disclosure of Buchanan's weak timidity, and of the consistent skill of Cobb, Jacob Thompson, Slidell, and Jeremiah Black in overawing him.[223]

Jeremiah Black, it should be noted, was Buchanan's attorney general, later nominated for the Supreme Court and rejected by the Senate. The report showed the use of government funds to secure political support. Two million dollars of government printing funds was used or misused in this way. "Equally shocking was the exposure of incompetence amounting to betrayal of duty on the part of Secretary [of War] Floyd. Incapable of taking dishonest money himself, the Virginian was willing to protect men who did. . . . Floyd had treated contracts, pay rolls, and appointments with a disregard for economy, efficiency, and the public welfare, and a readiness to assist political and personal friends, which were sometimes positively illegal."[224]

Whether we shall get from the Senate Watergate Committee a report of similar detail and cogency, we do not yet know. What we do know is that the indictments that have grown out of the investigation have produced no facts that were not already well-publicized, perhaps too well publicized, by the committee. And we know that both the indictments and the House impeachment committee's action will be based on data that was successfully kept from the committee's cognizance, with the acquiescence of the federal judiciary.

And that brings up the last possible alternative to impeachment that calls for consideration, criminal prosecution of a civil officer of the United States while still in office. It must be assumed that a civil officer who has resigned or has been removed from office cannot claim that because the charges against him might have supported an impeachment, he cannot be criminally prosecuted in the absence of prior impeachment proceedings. Former federal officials have been successfully prosecuted without meeting such condition precedent.

The argument is nevertheless made from article I, section 3, clause 7, which provides that "the Party convicted [on impeachment] shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment;" *i.e.*, a conviction on impeachment is a necessary condi-

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[223]A. NEVINS, *supra* note 219, at 197.

[224]*Id.* at 199.

tion precedent to criminal prosecution against an incumbent official. The provision was obviously, however, made to prevent the use of a conviction on impeachment, which can result only in removal or disqualification from office, as res judicata in a subsequent criminal proceeding on the grounds of *autrefois convict.*

There is nothing in the history of the 1787 Convention to shed light on the meaning of that provision other than what the words suggest, that a conviction on impeachment is not a bar to a criminal trial on the same grounds, if those grounds constitute an indictable offense. Nor have I found anything in the literature to suggest a more expansive reading. The fact is that none of those who have been convicted on impeachment have been subjected to further criminal prosecution. But the issue of barring criminal proceedings while the incumbent is in office has been made in the trial of Judge Otto Kerner of the United States Court of Appeals for the Seventh Circuit and, at least through the intermediate appeals court, the claim has been rejected.[225] But it must be noted that the crimes with which Judge Kerner was tried were committed prior to his ascension to the federal bench. The Supreme Court will be given the opportunity to deal with the question in the Kerner case. The defense was also raised by Vice-President Agnew, but he resigned and pleaded *nolo contendere* before the issue could be judicially resolved.

It should be noted that if such a condition precedent to the criminal processes is implicit in article I, section 3, clause 7, it is a very broad exemption indeed, since the provision for impeachment in article II is applicable to "all civil Officers of the United States." This alone would be reason to avoid such a reading of the provision barring a res judicata effect to a conviction.

Does this mean that the President of the United States is subject to criminal prosecution while he is in office? I do not think that it does, but not by reason of the impeachment provisions. Nor am I prepared to derive from the presence of a privilege against arrest for legislators, in article I, section 6, clause 1, a negation of any privilege in the President. The privilege from arrest given to Congressmen was essentially concerned with arrest for civil suits.[226]

My conclusion that the President of the United States is immune from criminal prosecution derives rather from the structure of the Constitution than its language. The President is, by reason of the fact that the executive power of the United States is vested in him, a unique official. He is the only officer of the United States whose duties under the Constitution are not shared with anyone else. He is the sole indis-

[225]U.S. v. Kerner, No. 73-1410 (7th Cir., Feb. 19, 1974).

[226]Long v. Ansell, 293 U.S. 76 (1934); Williamson v. United States, 207 U.S. 425, 446 (1880).

pensable man in the government, and his duties are of such a nature that he cannot be called from them at the instance of any other government or branch of government.

I am aware that this position was rejected by no less a personage than Chief Justice Marshall sitting as a nisi prius judge in the Aaron Burr case, who was of the opinion that the Presidency was not a task that "demanded his whole time."[227] But there are differences between the Burr case subpoena, to which Marshall referred, and the criminal process directed at the President himself. The first is that Marshall's call was for a small portion of the President's time as a witness to produce a document. The second is that he was wrong about the demands of the Presidency, if not at that time, certainly now, when a President cannot even go to the hospital without taking the Presidency with him. And, it should be remembered that Jefferson did not respond to the Marshall subpoena, because, he said: "The Constitution enjoins his constant agency in the concerns of six millions of people."[228] This, too, was the argument successfully made on behalf of President Andrew Johnson in *Mississippi* v. *Johnson*,[229] a case to which I have already alluded.

This brings me to the end of my overextended remarks about impeachment, and in the time remaining I should like to touch on a more fundamental problem spewed up by the Watergate tragedy.

VIII. The Meaning of Watergate

The question about the impeachment of a President, the issue to which I have directed my remarks, is undoubtedly one of great constitutional magnitude. But the resolution of all the problems presented by the impeachment question will leave the more fundamental ailment from which we suffer still uncured. People tend to see our present problems in terms of personalities. Judgment is too often governed by party loyalties, by personal predilections, by taste or distaste for the incumbent President. Once again I make an appeal to consider the issues in terms of the institutional creatures of our Constitution. Just as I think the question of the proper scope of judicial authority should not be determined by whether we like or dislike the judgments rendered by the Supreme Court,[230] but rather by its proper governmental function in our democratic polity, so, too, I think that the proper question to address now is the nature of the presidency and the institutional limits that are

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[227] *See* 3 A. Beveridge, John Marshall 445 (1919).

[228] 11 Writings of Thomas Jefferson 240-41 (A. Lipscomb mem. ed. 1905).

[229] 71 U.S. 475 at 486-88.

[230] *See, e.g.*, P. Kurland, Politics, The Constitution, and The Warren Court (1970).

most conducive to the maintenance of a democratic republic.

George Washington's decision not to be available for a third term as President of the United States was announced in what we have come to know as Washington's Farewell Address. Even Macaulay's schoolboy knows of the Farewell Address. Aside from the injunction to abstain from all foreign entanglements, however, the contents of the Farewell Address have been obscured by time and circumstance.

Henry Steele Commager has told us that the admonitions contained in the Address "have influenced American history far more than Washington himself could have anticipated."[231] And yet, it must be conceded that none of the advice so painstakingly offered has been abided.

Washington warned against political parties, and yet, they have come to dominate American political affairs. He advised against "overgrown military establishments which, under any form of government, are inauspicious to liberty, and which are now regarded as particularly hostile to republican liberty."[232] And we spend an eftraordinary number of billions each year on what we euphemistically call our "defense establishment." He admonished us that: "It will be worthy of a free, enlightened, and at no distant period a great nation to give to mankind the magnanimous and too novel example of a people always guided by an exalted justice and benevolence."[233] Yet, throughout the world, we find ourselves envied, but not liked, for our material possessions, and rarely applauded for our moral qualities.

Included among Washington's cautions was one that is particularly relevant to our problems of the day. It was as long ago as 1796 that he told us:

> It is important . . . that the habits of thinking in a free country should inspire caution in those intrusted with its administration to confine themselves within their respective spheres, avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. . . . If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this in one instance may be the instrument of good, it is the customary weapon by which governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient

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[231]H. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 169 (8th ed. 1968).

[232]*Id.* at 171.

[233]*Id.* at 173.

benefit which the use can at any time yield.[234]

We are governed today by a far different constitution than that which Washington bequeathed us. And the most basic changes have not been brought about by means of constitutional amendment as Washington would have had it. We have seen the concentration of power in the Presidency that has been achieved by the usurpation of which Washington warned us, aided largely by the abidication of responsibility by the Congress. We are, indeed, threatened by that despotism which he decried.

The affair called Watergate, however, has brought the spectre of totalitarianism to the attention of the American public. Now, as hardly ever before, we are cognizant of the crisis that we face. For the first time in many years Congress is seeking to assert itself. And the question is whether or not it is too late to restore the constitutional balance that our Founding Fathers created.

Heretofore, crisis has been the handmaiden of presidential power. Whether the crisis was economic, as was the case when Franklin Delano Roosevelt first came to power, or a military crisis of the kind that has plagued every generation of Americans, at least since World War I, it has always brought with it exaltation of executive authority. And each time, until the advent of the Vietnamese War, this concentration of authority has been justified not only by our leading politicians but also by our leading scholars—liberals and conservatives alike—either on the ground of necessity or expediency.

Thus, it was possible for Professor Clinton Rossiter, after World War II, in his book entitled *Constitutional Dictatorship,* to state as his conclusion:

> One final word. In describing the emergency governments of the western democracies, this book may have given the impression that such techniques of government as executive dictatorship, the delegation of legislative power, and lawmaking by administrative decree were purely transitory and temporary in nature. Such an impression would be distinctly misleading. There can no longer be any question that the constitutional democracies, faced with repeated emergencies and influenced by the examples of permanent authoritarian government all about them, are caught up in a pronounced, if lamentable trend toward more arbitrary, more powerful, and more "efficient" government. The instruments of government depicted here as temporary "crisis" arrangements have in some countries, and may in all countries, become lasting peacetime institutions.[235]

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[234] *Id.* at 172-73.

[235] C. ROSSITER, CONSTITUTIONAL DICTATORSHIP 313 (1963).

It is his concluding sentence that sends shivers up my spine:

> No sacrifice is too great for our democracy, least of all the temporary sacrifice of democracy itself.[236]

Facts are to be faced, however, and the facts are that since Roosevelt's tenure all meaningful government power has been vested in the national government. The only governmental powers that states now exercise are those allowed to them by the national government. State government is politically as well as economically bankrupt. And within the national government power has, since Roosevelt's day, been concentrated in the executive branch. This is not a result of the Nixon incumbency.

As long ago as 1968, before Richard Nixon was elected to his first term as President of the United States, Louis Heren, then Washington correspondent for *The Times* of London, wrote a perspicacious, if wrong-headed book, which described the dominance of presidential power in American government in this fashion:

> The modern American Presidency can be compared with the British monarchy as it existed for a century or more after the signing of the Magna Carta in 1215 . . . Indeed, it can be said that the main difference between the modern American President and a medieval monarch is that there has been a steady increase rather than a diminution of his power. In comparative historical terms the United States has been moving steadily backward.[237]

The point I should like to make here, however, is that the dangers to American democracy and freedom against which George Washington warned lie not only in the adhesion of power to a single man, the President, but the adhesion of power to the executive office, an office that includes the National Security Council, the Council of Economic Advisers, the C.I.A., and the Office of Management and Budget among its unchecked, unlimited, and unelected "guardians" of the American people. To use Mr. Heren's analogy, what we have witnessed in the Kennedy, the Johnson, and the Nixon administrations is a return to that period of English history when the power was not wielded solely by the king but by the king and his council; *i.e.*, to the period that led up to the American Revolution.

A startlingly perceptive and insightful work, Professor Bernard Bailyn's *The Ideological Origins of the American Revolution,* published in 1967, demonstrates that the intellectual case for the American Revolution—"The logic of Rebellion" as he termed it—was based not so much

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[236]*Id.* at 314.

[237]L. Heren, The New American Commonwealth 8, 9 (1968).

on those simplifications about George III and Lord North with which we are familiar, as on the notion that the English constitutional system on which all men's liberties depended had been perverted by the men around the Crown in conjunction with the king rather than by the king alone. Listen to Bailyn's words, and his use of the words of those who lived in the era that gave birth to our nation, and ask yourself whether the explanation does not fit our day equally well:

> The most common explanation, however—an explanation that rose from the deepest sources of British political culture that was a part of the very structure of British political thought—located "the spring and cause of all the distresses and complaints of the people in England or in America" in "a kind of fourth power that the constitution knows nothing of, or had not provided against." This "overruling arbitrary power, which absolutely controls the King, Lords, and Commons," was composed, it was said, of the "ministers and favorites" of the King, who, in defiance of God and man alike, "extend their usurped authority infinitely too far," and "throwing off the balance of the constitution, make their despotic will" the authority of the nation.
>
> > For their power and interest is so great that they can and do procure whatever they please, having (by power, interest, and the application of the people's money to *placemen* and *pensioners*) the whole legislative authority at their command. So that it is plain (not to say a word of a particular reigning arbitrary *Stuarchal* power among them) that the rights of the people are ruined and destroyed by ministerial *tyrannical* authority and thereby . . . become a kind of slaves to the ministers of state.
>
> This "junto of courtiers and state-jobbers," these "court-locusts," whispering in the royal ear, "instill in the King's mind a divine right of authority to command his subjects" at the same time as they advance their "detestable scheme" by misinforming and misleading the people.[238]

Bailyn earlier wrote:

> For the primary goal of the American Revolution was, which transformed American life and introduced a new era in human history, was not the overthrow or even the alteration of the existing social order but the preservation of political liberty threatened by the apparent corruption of the constitution, and the establishment in principle of the existing conditions of liberty.[239]

James Wilson in his lectures on the Constitution took note of the

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[238]B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 124-25 (1967).
[239]*Id.* at 19.

change brought about to ensure against a return to the "corruption of the Constitution" that was the effective cause of the Revolution. He said:

> In one important particular—the unity of the executive power—the constitution of the United States stands on an equal footing with that of Great Britain. In one respect, the provision is much more efficacious.
>
> The British throne is surrounded by counsellors. With regard to their authority, a profound and mysterious silence is observed. One effect, we know, they produce; and we perceive it to be a very pernicious one. Between power and responsibility, they interpose an impenetrable barrier. Who possesses the executive power? The king. When its baneful emanations fly over the land; who are responsible for the mischief? His ministers. Amidst their multitude, and the secrecy, with which business, especially that of a perilous kind, is transacted, it will be often difficult to select the culprits; still more so to punish them. The criminality will be diffused and blended with so much variety and intricacy, that it will be almost impossible to ascertain to how many it extends, and what particular share should be assigned to each.
>
> But let us trace this subject a little further. Though the power of the king's counsellors is not, as far as I can discover, defined or described in the British constitution; yet their seats are certainly provided for some purpose, and filled with some effect. What is wanting in authority may be supplied by intrigue; and, in the place of constitutional influence may be substituted that subtle ascendancy, which is acquired and preserved by deeply dissembled obsequiousness. To so many arts, secret, unceasing, and well directed, can we suppose that a prince, in whose disposition is found any thing weak, indolent, or accommodating, will not be frequently induced to yield? Hence springs the evils of a partial, and indecisive, and a disjointed administration.[240]

Has there been a better description of the evils of which Watergate is a symptom than this description of the failings of the British Constitution that the new American union was thought to have avoided? Wilson continued:

> In the United States, our first executive magistrate is not obnubilated behind the mysterious obscurity of counsellors. Power is communicated to him with liberality, though with ascertained limitations. To him the provident or improvident use of it is to be ascribed. For the first, he will have and deserve undivided applause. For the last, he will be subjected to censure; if necessary, to punishment. He is the dignified, but accountable magistrate of a free and great people.[241]

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[240] 1 WORKS OF JAMES WILSON 318-19 (R. McCloskey ed. 1967).

[241] *Id.* at 319.

Until the ascendancy of the imperial presidency, we understood and gloried in the improvement that the American Constitution had effected. Woodrow Wilson, in his book *Constitutional Government*, originally published in 1885, acknowledged this attempted change:

> Mr. Lodge is quite right in saying that the Convention, in adapting, improved upon the English Constitution with which its members were familiar,—the Constitution of George III, and Lord North, the Constitution which had failed to crush Bute. . . . [I]t was quite plainly a marked advance upon a parliament of royal nominees and pensionaries and a secret cabinet of "king's friends." The English Constitution of that day had a great many features which did not invite republican imitation. It was suspected, if not known, that the ministers who sat in parliament were little more than the tools of a ministry of royal favorites who were kept out of sight behind the strictest confidences of the Court. It was notorious that the subservient parliaments of the day represented the estates and the money of the peers and the influence of the King rather than the intelligence and purpose of the nation. The whole "form and pressure" of the time illustrated only too forcibly Lord Bute's sinister suggestion, that "the forms of a free and the ends of an arbitrary government are things not altogether incompatible."[242]

Thus the American Revolution was a political revolution, not a social or economic revolution. It was fought to restore the constitutional balance that Englishmen and Americans thought essential to the liberties they claimed. In the two centuries that have elapsed, the "corruption of the constitution" which they deplored has once again occurred. And, if our liberties are to be preserved, we should be looking to the means to restore the constitutional balance among the three branches of government.

The first step toward the restoration of our constitutional democracy is clear to me, if to no one else. It would be the abolition of the "fourth branch of government,"—to quote again from Bailyn's sources—"a kind of fourth power that the constitution knows nothing of, or has not provided against."

I don't know yet when the euphemism "The White House" first came into use as a description of something other than the Presidential mansion at 1600 Pennsylvania Avenue. But it was exactly when the "White House" became what it now is, a fourth branch of American government, that we were committed to take the road that led to Watergate.

The growth of the White House has been deplored even by those who have been important parts of it. Probably the first step in the

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[242]W. WILSON, CONSTITUTIONAL GOVERNMENT 200-01 (Meridian ed. 1956).

growth of the fourth branch was taken pursuant to the Reorganization Plan of 1939, forced by Franklin Roosevelt through a reluctant Congress. Judge Sam Rosenman became the first White House counsel pursuant to that plan. He has recently denounced the growth of the White House in these words:

> The great recent growth of the White House staff around the President has been, I think, undesirable. The primary objection is the fact that the larger the staff gets, the more clumsy and inefficient it becomes. . . . When I served as Special Counsel to FDR after 1943, I had no assistants at all. The man in that position today has at least four or five. I cannot imagine what they all do.
>
> A further great objection to an inflated staff is its inevitable tendency, as it takes on more and more functional duties, to become an operational rather than an advisory body. The process has two very bad results. First: it duplicates and conflicts with the action and responsibility of the departments, thus impeding the chance of responsible relations with Congress, since it increases the number of staff officials empowered to act behind the shield of executive privilege. . . . The consequence is a drastic loss of accountability to Congress that any presidency should respect.[243]

We get still the same expression, however grudgingly, from a Kennedy White House staffer, Theodore Sorenson:

> [T]he White House staff may now be too large numerically. There is no need to duplicate the entire machinery of the State Department in the White House basement. Nor is there any need to shift the important functions of the Bureau of the Budget (now the OMB) to within the White House walls.[244]

It must be conceded that these experts did not see the problems that they helped create until another party had control of the White House. Sorenson, like Schlesinger, would not attribute the same evils to the Kennedy regime in which they served in the White House, although they might be forced to concede that it was McGeorge Bundy who created the duplicate State Department in the White House basement during the Kennedy administration. Suffice it that they and you now understand the evils that have resulted from the return to king's counsellors as the controllers of government.

My proposal is, therefore, that the first step back towards our constitutionally established democratic principles is to remove the powers accumulated in the so-called Executive Office of the President, to dissipate the Office of Management and Budget, the National Security

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[243] E. HUGHES, THE LIVING PRESIDENCY 361-62 (1973).

[244] *Id.* at 367.

Council, the Council of Economic Advisers, the czar of this and the emperor of that. Put these functions back in offices that are subject to Congressional control and public scrutiny, or in administrative agencies that can be made totally free of Executive Office corruption.

Watergate, however, is the consequence not of one but of two kinds of corruption. The first is that which I have described as the "corruption of the Constitution." The second is the corruption of the people and their chosen governors.

Long ago, Mr. Justice Story wrote with prescience what Washington had preached in his Farewell Address. Story said:

> [U]nless the people do at all times possess virtue, and firmness, and intelligence enough, to reject mischievous influences; unless they are well instructed in public affairs, and resolutely maintain the principles of the constitution, it is obvious, that the government itself must soon degenerate into an oligarchy; and the dominant faction will rule with an unbounded and desolating energy.[245]
>
> * **
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> The great mass of human calamities, in all ages, has been the result of bad government, or ill adjusted government; of a capricious exercise of power, a fluctuating public policy, a degrading tyranny, or a desolating ambition.[246]

I have already referred to what a little-known Supreme Court Justice, in a lesser-known Supreme Court case, once wrote: "The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by consideration of right, justice and the public good."[247] A better-known judge, Chief Justice Warren, in a better-known case, for it derived from the Dixon-Yates controversy which is within the memory of some of us, said: "[A] democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption."[248]

The fact is, of course, that no institutions, however perfect—and the constitutional plan of checks and balances can hardly be deemed perfect—can function without virtuous human beings to run them. The Founders had in mind not only a concept of the Presidency but also the kind of man they wanted when they prepared article II. Despite their great respect for George Washington, they limited the executive power

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[245] J. STORY, MISCELLANEOUS WRITINGS 158 (1835).

[246] *Id.* at 150.

[247] Trist v. Child, 88 U.S. (21 Wall.) 441, 450 (1874) (Swayne, J.).

[248] United States v. Mississippi Valley Generating Co., 364 U.S. 520, 562 (1961).

as no national government had ever before limited executive power. The need for a Washington was, nevertheless, pervasively felt. The problem of finding the right men for the right governmental posts has long plagued us. The distinguished French historian, Francois Guizot supplied the introduction to Jared Spark's biography of Washington. In 1837, Guizot wrote:

> The disposition of the most eminent men, and of the best among the most eminent, to keep aloof from public affairs, in a free democratic society, is a serious fact. Washington, Jefferson, Madison, all ardently sighed for retirement. It would seem as if, in this form of society, the tasks of government were too severe for men who are capable of comprehending its extent, and desirous of discharging the trust in a proper manner.
>
> Still, to such men alone this task is suited, and ought to be intrusted. Government will be, always everywhere, the greatest exercise of the faculties of man, and consequently that which requires minds of the highest order. It is for the honor, as well as for the interest, of society, that such minds should be drawn into the administration of its affairs, and retained there; for no institutions, no securities, can supply their place.[249]

Today we are suffering not only from a corruption of the Constitution through perversion of the institutions of government, but also from a corruption of the Constitution because the men we have chosen for high office are unworthy. A President of the United States who tells us that he is "not a crook," thereby affords little reassurance of his qualifications for office, even if we could still credit him with a capacity for the whole truth. It is not enough that the President of the United States is "not a crook." There is more to honor and duty than not stealing from the public fisc. The reassurances we need and have not received—because deeds and not words are the only cogent evidence here—is that the authority of the United States government is not expended merely to effectuate the personal whims or wishes of those in high authority, nor to benefit their personal friends and do harm to their personal enemies. And, as Mr. Chief Justice Waite once told us: "In a court of conscience deliberate concealment is equivalent to deliberate falsehood. . . . Honesty of purpose prompts frankness of statement. Concealment is indicative of fraud."[250]

A system of Presidential selection—not, incidentally, the one created by the Constitution—that so frequently leaves the voters a choice between the devil and the deep blue sea helped bring us to this grievous

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[249]F. Guizot, Historical Essays and Lectures 412 (S. Mellon ed. 1972).

[250]Crosby v. Buchanan, 90 U.S. (23 Wall.) 420, 454, 457 (1875).

point in our history. But that is another tale that requires another time for the telling, however short of time we may be.

The crisis called Watergate has provided us pain and suffering, outrage and disgust, fear and trembling. It has also afforded us an opportunity not likely to come again, to reexamine the "corruption of the Constitution" from which we have been suffering these many years and to try to effect a remedy before it is too late.

Archibald MacLeish's poem, *The Black Day*, was written to a different issue, but it affords appropriate words to end my undertaking here.

> God help that country cankered deep by doubt,
> Where honest men, by scandals turned about,
> See honor murdered and will not speak out.
> God help that country! But for you—for you—
> Pure heart, sweet spring, humble, loyal, true
> Pretend, pretend, we know not what we do.[251]

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[251] A. MACLEISH, *Black Day* in THE COLLECTED POEMS OF ARCHIBALD MACLEISH 169 (1962).

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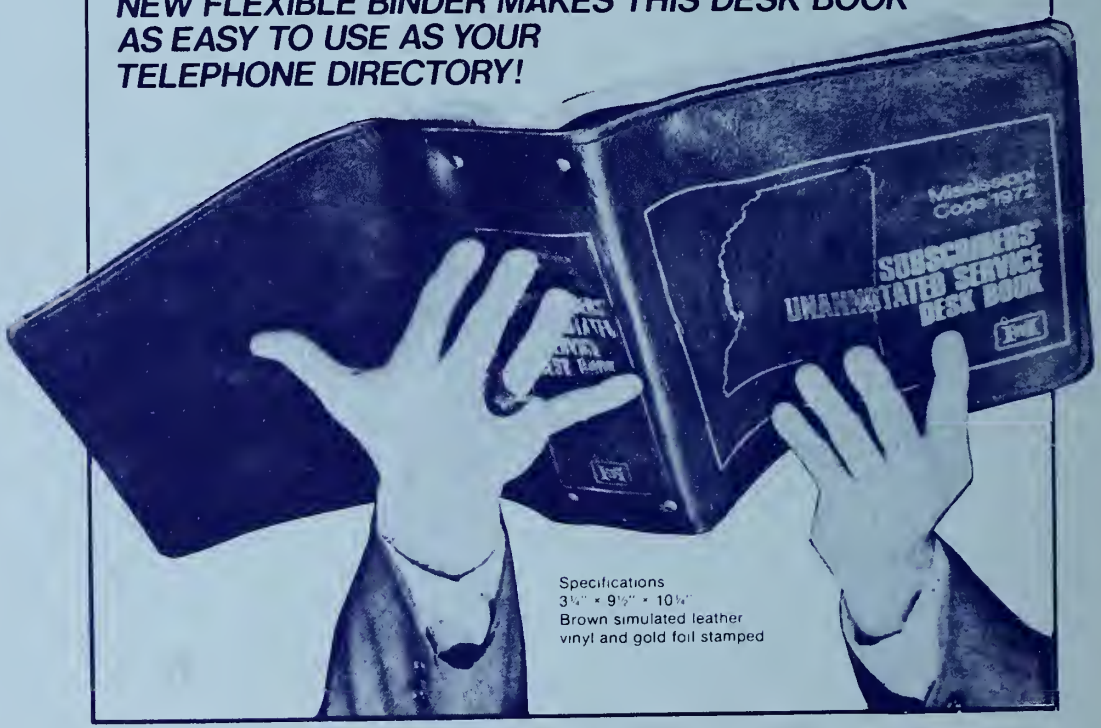
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